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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 17

PARTMAR CORPORATION AND FANCHON AND MARCO, INC., PETITIONERS,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 4, 1953

CERTIORARI GRANTED MAY 25, 1953

No. 13113

United States Court of Appeals for the Ninth Circuit.

PARTMAR CORPORATION and FANCHON & MARCO, INC.,

Appellants,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION and PARAMOUNT PICTURES, INC.,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the Southern District of California, Central Division

Civil No. 6906-WM

PARAMOUNT PICTURES THEATRES CORPORATION, a Corporation,

Plaintiff,

vs.

PARTMAR CORPORATION, a Corporation, and FANCHON & MARCO, INC., a Corporation,

Defendants.

COMPLAINT

Plaintiff for cause of action against defendants, and each of them, alleges as follows:

First Cause of Action

1. Plaintiff Paramount Pictures Theatres Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of New York, is a resident and citizen of the State of New York, and is duly qualified to do and is doing business in the State of California.

2. Defendant Partmar Corporation (hereinafter referred to as "Partmar") is a corporation duly organized and existing [2*] under and by virtue of the laws of the State of California and is a resident and citizen of the State of California.

3. Defendant Fanchon & Marco, Inc., (herein-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

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after referred to as "Guarantor") is a corporation duly organized and existing under and by virtue of the laws of the State of California and is a resident and citizen of the State of California.

4. The amount in controversy, exclusive of interest and costs, is in excess of the sum of $3,000.00.

5. A written lease was entered into, dated January 1, 1939, but was actually executed and delivered on August 30, 1939, between Paramount Pictures, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, which was and is a resident and citizen of the State of New York, being qualified to do and doing business in the State of California, as Lessor (hereinafter referred to as "Paramount Pictures") and defendant Partmar, as Lessee, of the theatre portion of the building known as the Paramount Theatre Building, located on the northeast corner of Sixth and Hill Streets in the City of Los Angeles, County of Los Angeles, State of California, the land upon which said building is erected being more particularly described as follows:

> Lots Six (6) and Seven (7) in Block Fourteen (14) of Ord's Survey, as per map thereof recorded in Book 53, at pages 66 et seq. Miscellaneous Records of said County of Los Angeles, excepting therefrom that portion of said lots being approximately the easterly ten (10) feet thereof that has been taken for alley purposes,

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together with all exits, entrances and appurtenant passageways and courtways and easements for light or air in connection [3] therewith; together with the furnishings, fixtures, personal property and equipment then contained or located in said portion of said building. Said lease was for a term commencing as of January 1, 1939, and ending on August 31, 1949, unless said term should be sooner terminated as therein set forth. Partmar covenanted thereby to pay to Paramount Pictures from and after August 31, 1939, the fixed weekly rental of $2,200.00 for each lease week, payable in advance on the first day of each and every said week, together with an additional sum equivalent to the excess, if any, over and above the aggregate amount of the fixed rent for each twelve-month period, of a sum equivalent to the total of 15 per cent of the gross receipts, as therein defined, during the portion of such twelve-month period as the theatre upon the demised premises is operated on a "straight picture policy" as therein defined, plus 12½ per cent of the said gross receipts during the portion of said twelve-month period as said theatre is operated on a "stage show policy."

Partmar thereby covenanted to use the demised premises solely and exclusively for the presentation of entertainment consisting either of a "straight picture policy" or a "stage show policy," as therein defined, and said lease particularly obligated Lessee to exhibit in the demised premises during the demised term the motion pictures released and distributed by Paramount Pictures, and licensed for

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exhibition therein pursuant to that certain franchise agreement, dated as of September 1, 1939, by and between Paramount Pictures and Partmar, hereinafter more particularly referred to.

6. Paramount Pictures is and has been for a period of time commencing long prior to the execution of said lease engaged in the business of producing motion pictures and, either directly [4] or through subsidiaries, of releasing and distributing motion pictures produced by itself or by others. The theatre portion of the Paramount Theatre Building, leased as aforesaid, was constructed, owned and operated by Paramount Pictures and its predecessors for the exclusive purpose and object of having a high class motion picture theatre with a large seating capacity centrally located in the City of Los Angeles for first run exhibitions of motion pictures released and distributed by Paramount Pictures, such theatre being commonly known in the motion picture industry as a "showcase" theatre for such pictures.

In the business of releasing and distributing motion pictures it is generally necessary for the profitable exploitation thereof that each picture so released and distributed be given its first general public showing in large high class motion picture theatres operated on a deluxe basis and centrally located in each of the larger metropolitan centers in the United States, including the City of Los Angeles. The Paramount Theatre is such a theatre. Such exhibition is a source of a substantial portion of the revenue derived from the production, release

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and distribution of motion pictures because such first-run exhibition generally commands higher admission prices than subsequent run exhibitions and therefore it is desirable that such first-run exhibition be had in theatres with large seating capacity and located, equipped and operated in such a manner as to attract the maximum number of patrons willing to pay such higher prices. Furthermore, the first-run exhibition of a motion picture is accomplished by extensive advertising and receives extensive publicity in metropolitan and other newspapers, in national magazines, in trade publications, by radio broadcasts and by other means of communication which induces in the general public a [5] desire to see such picture. As a result, motion picture exhibitors operating theatres in all parts of the area adjacent to such large cities within a radius of many miles are desirous of exhibiting such picture because of the public demand therefor created by such first-run exhibition and its attendant advertising and publicity. Unless such picture secures such first-run exhibition in such high class theatres in such large cities, it cannot be as readily sold to other exhibitors nor will the general public as readily attend exhibitions thereof. For that reason it is the custom and practice in the motion picture industry for the larger motion picture companies who produce, release and distribute pictures, to own or operate theatres in the larger cities in the United States, or by arrangements with other owners or operators, wherever possible, to otherwise secure a regular and permanent outlet for first-run exhibition in large, modern and centrally located

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theatres in said cities for the pictures released and distributed by said companies, such theatres thereby acting as a "showcase" for such pictures.

The exclusive purpose and object of the ownership and operation of the Paramount Theatre by Paramount Pictures and its predecessors above set forth and the reasons therefor was known to and fully understood by both Paramount Pictures and Partmar and was the basis upon which said lease to Partmar was made in conjunction with the franchise agreement contemporaneously and simultaneously executed as next hereinafter alleged.

In order to accomplish this purpose and object, Paramount Pictures and Partmar, concurrently with the execution and delivery of said lease, and on August 30, 1939, as of September 1, 1939, made and entered into a written agreement whereby Paramount Pictures granted to Partmar a film franchise for the said [6] Paramount Theatre for a term of ten years, commencing September 1, 1939, and ending August 31, 1949, whereby Partmar was granted a license to exhibit in the Paramount Theatre motion pictures and sound recordings thereof released and distributed by Paramount Pictures of specified classifications and numbers for each year of said ten-year term, and whereby Partmar covenanted and agreed to exhibit all said motion pictures produced and released by Paramount Pictures for the periods, upon the terms and conditions, and for the royalties as therein provided, and whereby Partmar agreed to charge prices for admission to said theatre at rates therein specified,

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and to pay to Paramount Pictures license fees based upon gross receipts from said exhibitions at said theatre, as therein defined.

Said franchise agreement further provided that Partmar should exhibit in the Paramount Theatre pictures released and distributed by Paramount Pictures for a total of at least 46 out of each 52 weeks in each year of the term thereof, all in furtherance of the purpose and object thereof and to assure Paramount Pictures that all of the pictures released and distributed by it would be given first-run exhibition in the Paramount Theatre and thus receive the "showcase" presentation necessary for the profitable distribution thereof as hereinabove alleged.

In furtherance of said object and purpose said franchise agreement specifically provided that in the event the lease hereinabove referred to, executed and delivered simultaneously with said franchise agreement, should for any reason be cancelled or terminated, Paramount might at its option cancel and terminate said franchise agreement upon the mailing of written notice.

Likewise, in furtherance of said object and purpose of said lease and said franchise agreement as set forth above, said [7] lease provided in Article XXIX, Section 1(e) thereof, that if at any time during the period of said lease

> "that certain franchise agreement, dated as of September 1, 1939, by and between Lessor and Lessee, relating to the exhibition in the demised

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premises of motion pictures, generally released as 'Paramount Pictures' to be entered into simultaneously with the execution and delivery of this lease, be cancelled or terminated for any reason whatsoever, then and in any of said events, Lessor may, at its option, give Lessee written notice stating that by reason thereof the term of this lease shall cease and expire three (3) days from the date of the mailing of the same, and upon the mailing of such notice this lease shall cease and expire and be cancelled and terminated, and the term hereby demised be brought to an end by lapse of time upon the third day thereafter as fully and completely as though that were the date in this lease distinctly fixed for the expiration of the demised term."

Said last-quoted provision of said lease was agreed upon and included in said lease in order to carry out the basic understanding of Paramount Pictures and Partmar that the continuance of the leasehold was entirely dependent upon the continuation of the franchise agreement whereby motion pictures produced by Paramount Pictures would be exhibited in the Paramount Theatre constructed and owned by Paramount Pictures and whereby in the event such franchise agreement was at an end and could not be further performed for any reason whatsoever, Paramount Pictures should have the absolute right and option to terminate the lease [8] on three (3) days' written notice and to have the immediate possession of the Paramount Theatre in

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order that it could continue itself to exhibit therein motion pictures released and distributed by itself; and this was the understanding and agreement of both parties to said lease.

7. Under date of September 1, 1942, an amendatory agreement was made and entered into between Paramount Pictures and Partmar whereby the term of said lease entered into as of January 1, 1939, and executed and delivered August 30, 1939, as hereinabove alleged, was extended to March 18, 1952, unless sooner terminated as therein and in said lease provided; and whereby Partmar covenanted to pay Paramount Pictures additional rent commencing September 1, 1942, and continuing during the remainder of said term as extended at the rate of 50 per cent of the net receipts from the operation of the demised premises, as the term net receipts is therein defined.

Likewise on September 1, 1942, Paramount Pictures and Partmar entered into an amendatory agreement extending to March 18, 1952, said franchise agreement, dated August 30, 1939, effective as of September 1, 1939, hereinabove referred to.

In Paragraph 5 of said agreement of September 1, 1942, extending and amending said lease, all references in Article XXIX, Section 1 of said lease to the franchise agreement, dated as of September 1, 1939, are specifically amended to provide that all such references shall thereafter apply to said franchanise agreement, dated as of September 1, 1939,

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as amended by the said agreement relating thereto, dated as of September 1, 1942.

8. Under date of September 29, 1944, Paramount Pictures made, executed and delivered to plaintiff a deed conveying the land hereinabove described and the building thereon known as [9] the Paramount Theatre Building. On the same date by written instrument Paramount Pictures assigned to plaintiff the lessor's interest and all rights thereunder in and to said lease, as amended, between Paramount Pictures and Partmar. Paramount Pictures owns 100 per cent of the stock of plaintiff, and plaintiff is a wholly owned subsidiary of Paramount Pictures.

9. On or about July 20, 1938, the United States of America filed suit in the United States District Court for the Southern District of New York against Paramount Pictures and others in that certain suit entitled "United States of America, Plaintiff, vs. Paramount Pictures, Inc., et al., defendants," being Equity No. 87-273, alleging violations by the defendants, including Paramount Pictures and its subsidiary corporations, of Sections 1 and 2 of an Act of Congress of July 20, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restrictions and Monopolies," commonly known as the Sherman Act. After certain intervening proceedings therein, a trial was had, evidence was received, the matter was submitted on briefs before a three-judge Expediting Court, and on June 11, 1946, said Court rendered its decision in said

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Equity No. 87-273 adjudicating, among other things, that all franchise agreements granted by Paramount Pictures and the other defendants therein, were, from their formation, and are an unlawful restraint of trade and were and are in violation of said Sherman Act. Thereafter and on December 31, 1946, said court made and filed in said action its Findings of Fact and Conclusions of Law wherein, among other things, it found that:

> ". . . franchises have been entered into by the distributor defendants [including therein Paramount Pictures] and unreasonably restrain trade because they cover too [10] long a period (more than one season) and also because they embrace all the features released by a given distributor,"

and wherein said court concluded that defendant Paramount Pictures, Inc., and others

> "have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures and attempted to monopolize such trade and commerce in violation of the Sherman Act by,"

among other things, making franchises with its licensees and that the franchises so entered into have tended to restrain trade and that they violate Section 1 of the Sherman Act. Said Court thereupon entered its decree therein under date of December 31, 1946, effective April 1, 1947, perpetually enjoining Paramount Pictures,

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"from further performing any existing franchise to which it is a party and from making any franchises in the future. The term 'franchise' as used herein means a licensing agreement or series of licensing agreements entered into as a part of the same transaction in effect for more than one motion picture season and covering exhibitions of pictures released by one distributor during the entire period of agreement,"

and thereby perpetually enjoined Paramount Pictures from and after April 1, 1947, from performing the franchise between it and Partmar dated August 31, 1939, as of September 1, 1939, as amended, as hereinabove alleged.

10. Said court further adjudicated in its opinion dated June 11, 1946, in said Equity No. 87-273 that it was lawful and [11] proper and not in violation of any of the laws of the United States for Paramount Pictures or any other motion picture company to exhibit motion pictures released or distributed by it in a theatre owned by it or by its wholly-owned subsidiary and upon such terms as to admission prices and clearances and on such runs as such company may see fit.

Said court further in its Findings of Fact, hereinbefore referred to, found as a fact that:

"The successful exhibition of a feature in its initial runs in any area is widely publicized and closely observed by subsequent run exhibitors in that area and success in exploiting a picture in

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> such exhibitions produces increased revenue both for the distributor and for subsequent run exhibitors."

and that Paramount Pictures

> "is able to coordinate the original exhibition of its features in its theatres with an extensive and accurately timed national advertising campaign."

Said court further in its decree dated December 31, 1946, provided that nothing contained therein should be construed to limit in any way whatsoever the right of defendant Paramount Pictures to license or in any way to arrange or provide for the exhibition of any or all motion pictures which it might at any time distribute in such manner and upon such terms and subject to such conditions as may be satisfactory to it in any theatre in which Paramount Pictures had or might acquire pursuant to the terms of the decree, a proprietary interest of 95% or more, either directly or through subsidiaries.

The result of said decree in Equity No. 87-273 was:

> (1) To put an end to all further performance by [12] either Paramount Pictures or Partmar under said franchise and to terminate it once and for all;
>
> (2) Thereby to destroy the assurance to Paramount Pictures of a "showcase" for all pictures released and distributed by it so long

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as defendant Partmar remains in possession under said lease, by reason of the fact that said Partmar is no longer required to exhibit in said theatre all or any of the motion pictures released and distributed by Paramount Pictures as it had been so required under the terms of said franchise, and thus to destroy the purpose and object of the execution of the lease and franchise agreement as hereinabove alleged; and

(3) To authorize Paramount Pictures to exhibit motion pictures produced by it on such terms as it desires in a theatre or theatres owned by it, or by plaintiff as its wholly owned subsidiary. Neither Paramount Pictures. nor any of its subsidiaries, including plaintiff, owns or controls any theatre in the downtown section of Los Angeles, except its interest in the Paramount Theatre as hereinabove alleged.

The portions of said decree in said Equity No. 87-273 relating to the said franchise agreements, have, since on or about March 31, 1947, become and now are final.

11. Said franchise agreement dated as of September 1, 1939, as amended, between Paramount Pictures and Partmar, hereinabove referred to, provided in paragraph Twenty-second (c) that: [13]

"In case Paramount shall be delayed in or prevented from the performance of this agreement with respect to any of the photoplays

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licensed hereunder by reason of * * * order of any court of competent jurisdiction * * * or any other similar or dissimilar cause whatsoever beyond the control of Paramount, then such delay or failure of performance in respect of such photoplays shall be excused and all claims or causes of action for damages therefor are hereby waived by the Exhibitor [Lessee]. Such delay in or failure of performance shall not affect this agreement with respect of other photoplays licensed hereunder."

12. By reason of the foregoing, said franchise agreement dated August 31, 1939, as of September 1, 1939, between Paramount Pictures and defendant Partmar, as amended by said agreement dated September 1, 1942, as foresaid was terminated effective as of the close of business March 31, 1947. On March 26, 1947, Paramount Pictures duly notified Partmar in writing of said fact.

13. Pursuant to the provisions of Paragraph XXIX, Section 1 of said lease dated January 1, 1939, executed and delivered August 30, 1939, as hereinabove alleged, plaintiff exercised its option and gave Partmar a written notice dated April 2, 1947, stating that by reason thereof the term of such lease should cease and expire three days from the date of said notice. Said lease was thereupon terminated effective on or about April 5, 1947, and the term of said lease thereupon expired. Partmar failed to surrender up possession of said demised premises upon the expiration of said three days

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after receiving said notice [14] of April 2, 1947, as provided in Paragraph XXIX, Section 1 of said lease. Plaintiff thereupon, on April 7, 1947, delivered to Partmar a written Notice to Quit within three days after the date of said notice of April 7, 1947.

14. Defendant Partmar has failed and refused and does now fail and refuse to vacate and surrender possession of said demised premises to plaintiff, and said defendant has continued, and does now continue, wrongfully to withhold from plaintiff the possession thereof. Defendant Partmar has failed and refused to pay to plaintiff the rental fixed for said demises premises or the percentage of gross receipts and net receipts, as required by the terms of the lease in the event of termination of said lease, and there is now due and owing to plaintiff from said defendant as such rental and other sums due and owing under the terms of said lease a sum the amount of which is unknown to plaintiff by reason of the fact that the same can be determined in accordance with the terms of said lease only upon accounting had therefore as provided by said lease. Plaintiff has demanded from defendant Partmar such accounting but defendant Partmar has refused and now refuses to render such an accounting or to pay the sums shown to be due thereby. Further sums will accrue to plaintiff hereafter and until the entry of a final judgment herein for the wrongful withholding of said demised premises by defendant Partmar.

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Plaintiff has been further damaged by the wrongful withholding by said defendant in the sum of $200,000.

15. By the terms of Paragraph XXVIII of said lease, defendant Partmar covenanted and agreed to pay any and all reasonable or proper costs and expenses, including a reasonable attorneys' and counsel fee, that might at any time result from or arise out of, or that plaintiff may pay or incur in enforcing or [15] seeking to enforce any of the terms, covenants, conditions, agreements, obligations, provisions or undertakings of said lease. Plaintiff has incurred costs and expenses, including attorneys' fees, and will incur further such expenses in the enforcement of its rights to recover possession of the demised premises. Plaintiff requests that the court determine the reasonable costs and expenses, including attorneys' fees, incurred and to be incurred by plaintiff in the bringing and maintaining of this proceeding through to final judgment.

16. Plaintiff has performed all covenants and conditions on its part required to be performed under and pursuant to the terms and provisions of said lease as amended.

Second Cause of Action

1. Plaintiff by this express reference thereto repeats and realleges herein as though expressly made a part hereof each and every allegation contained

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in Paragraphs 1 to 5, inclusive, of the First Cause of Action hereof.

2. Said lease provided in Article XXIX, Section 1(e) thereof that if at any time during the period of said lease

> "that certain franchise agreement, dated as of September 1, 1939, by and between Lessor and Lessee, relating to the exhibition in the demised premises of motion pictures, generally released as 'Paramount Pictures' to be entered into simultaneously with the execution and delivery of this lease, be cancelled or terminated for any reason whatsoever, then and in any of said events, Lessor may, at its option, give Lessee written notice stating that by reason thereof the term of this lease shall cease and expire three (3) days [16] from the date of the mailing of the same, and upon the mailing of such notice this lease shall cease and expire and be cancelled and terminated, and the term hereby demised be brought to an end by lapse of time upon the third day thereafter as fully and completely as though that were the date in this lease distinctly fixed for the expiration of the demised term."

3. Concurrently with the execution and delivery of said lease and on August 30, 1939, as of September 1, 1939, Paramount Pictures and Partmar made and entered into a written agreement whereby Paramount Pictures granted to Partmar a film franchise for the said Paramount Theatre for a

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term of ten years, commencing September 1, 1939, and ending August 31, 1949, whereby Partmar was granted a license to exhibit in the Paramount Theatre motion pictures and sound recordings thereof released and distributed by Paramount Pictures of specified classifications and numbers for each year of said ten-year term, and whereby Partmar covenanted and agreed to exhibit all said motion pictures produced and released by Paramount Pictures for the periods, upon the terms and conditions, and for the royalties as therein provided.

4. Plaintiff by this express reference thereto now repeats and realleges herein as though expressly made a part hereof each and every allegation contained in Paragraphs 7, 8 and 9 of the First Cause of Action hereof.

5. Each and all of the provisions of said decree in said Equity No. 87-273 hereinabove in this cause of action alleged have since on or about March 31, 1947, become and now are final.

6. Plaintiff by this express reference thereto now [17] repeats and realleges as though expressly made a part hereof each and every allegation contained in Paragraphs 11 to 16, inclusive, of the First Cause of Action hereof.

Third Cause of Action

1. Plaintiff by this express reference thereto repeats and realleges herein as thought expressly made a part hereof, each and every allegation con-

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tained in Paragraphs 1 to 16, inclusive, of the First Cause of Action hereof.

2. On September 1, 1942, as a part of said agreement extending the term of said lease to March 18, 1952, as hereinabove alleged, Paramount Pictures made a loan to Partmar in the sum of $28,000, evidenced by a promissory note executed by Partmar, payable in annual installments of $4,000 each, commencing August 31, 1943, and continuing to and including August 31, 1949, together with interest at the rate of 2% per annum from September 1, 1942; upon the condition, however, that said note shall be deemed fully matured and the entire unpaid balance of principal and accrued interest thereunder shall immediately become due and payable, among other things, in the event that said lease as amended shall cease and expire or be cancelled or terminated as provided in Article XXIX, Section 1 of said lease, as amended. The unpaid principal balance of said note on April 1, 1947, was the sum of $12,000, together with accrued unpaid interest thereunder at the rate of 2% per annum from September 1, 1946.

3. Said note dated September 1, 1942, executed by Partmar in favor of Paramount Pictures was by written instrument dated September 29, 1944, duly assigned by Paramount Pictures to plaintiff and plaintiff at all times since said date has [18] been and now is the owner and holder of said note and all rights and interests therein and thereunder.

4. By reason of the termination of said lease

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as amended as hereinabove alleged, the unpaid principal balance and interest under said note, to wit, the sum of $12,000 plus unpaid interest, is now due, owing and unpaid by defendant Partmar to plaintiff. No part of said sum of $12,000, plus interest thereon as aforesaid, has been paid to plaintiff by said defendant or by any one else.

Fourth Cause of Action

1. Plaintiff by this express reference thereto repeats and realleges herein as though expressly made a part hereof, each and every allegation contained in Paragraphs 1 to 16, inclusive, of the First Cause of Action hereof and Paragraphs 1 to 4, inclusive, of the Third Cause of Action hereof.

2. Defendant Fanchon & Marco owns 100% of the capital stock of defendant Partmar and the latter is a wholly-owned subsidiary of the former.

3. By written guaranty dated January 1, 1939, defendant Fanchon & Marco guaranteed to Paramount Pictures, its successors and assigns, performance of the lease to Partmar, with the limits of the guarantor's liability not to exceed the sum of $100,000. On January 18, 1943, effective as of September 1, 1942, defendant Fanchon & Marco executed and delivered to Paramount Pictures an agreement supplementing the last-mentioned guaranty to include a guaranty of performance of the lease as amended and the payment of the note dated September 1, 1942, executed by defendant Partmar and

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delivered to Paramount Pictures as hereinabove referred to. [19]

4. By written instrument dated September 29, 1944, Paramount Pictures assigned to plaintiff all rights of Paramount Pictures in and to said guaranty executed by defendant Fanchon & Marco under date of January 1, 1939, and its amendment of January 18, 1943, above referred to.

5. Defendant Fanchon & Marco has failed and refused, and does now fail and refuse to pay said rental, said costs and expenses, said attorneys' fees, the unpaid balance of principal and accrued interest on said note, or any other sums as provided in said lease, note and guaranty, or any part of any of said sums, either to Paramount Pictures or to plaintiff.

Fifth Cause of Action

1. Plaintiff by this express reference thereto repeats and realleges herein, as though expressly made a part hereof, each and every allegation contained in Paragraphs 1 to 16, inclusive, of the First Cause of Action hereof.

2. An actual controversy has arisen and now exists between plaintiff and defendants. Plaintiff claims and contends that said lease dated January 1, 1939, effective August 31, 1939, has been terminated, effective on or about April 5, 1947, and that since said last-mentioned date Partmar has been and is now wrongfully withholding possession of said Paramount Theatre. Defendants deny the forego-

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ing claims and contentions of plaintiff and claim and contend that said lease is in full force and effect.

Wherefore, plaintiff prays for judgment against defendants, and each of them, as follows:

1. Adjudicating and declaring that said lease dated January 1, 1939, effective August 31, 1939, as amended, was terminated [20] on or about April 5, 1947;

2. Adjudicating and declaring that defendant Partmar is and has been since on or about April 5, 1947, unlawfully and wrongfully withholding and continuing to withhold possession from plaintiff of said demised premises and that plaintiff is entitled to the immediate possession thereof;

3. Adjudicating and declaring that plaintiff is entitled to recover from defendants, and each of them, all sums due, owing and unpaid to plaintiff pursuant to the terms and provisions of said lease as amended, together with interest at the legal rate from the respective dates on which said sums became due, and for an accounting from defendants of all sums so owing under said lease as amended;

4. Adjudging that plaintiff recover from defendants, and each of them, treble damages in the sum of $600,000 for the unlawful and wrongful withholding of possession of said demised premises;

5. Adjudging that plaintiff recover from de-

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fendants, and each of them, the sum of $12,000, together with interest thereon at the rate of 2% per annum from September 1, 1946;

6. Adjudging that plaintiff recover from defendants, and each of them, its costs and expenses, including reasonable attorneys' fees, incurred in the bringing and maintenance of this action through to final judgment, and for the court to adjudicate the reasonable amount of such costs, expenses and attorneys' fees to which plaintiff is entitled under the terms of said lease as amended; and [21]

7. For such other and further relief as to the court may seem proper.

O'MELVENY & MYERS,
WM. B. CARMAN, JR.,
THOMAS O. McCRANEY,
RODNEY K. POTTER,
JACKSON W. CHANCE,

By /s/ W. B. CARMAN, JR.,
Attorneys for Plaintiff.

[Endorsed]: Filed May 1, 1947. [22]

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In the District Court of the United States for the Southern District of California, Central Division

Civil No. 6906—WM

PARAMOUNT PICTURES THEATRES CORPORATION, a Corporation,

Plaintiff,

vs.

PARTMAR CORPORATION, a Corporation, and FANCHON & MARCO, INC., a Corporation,

Defendants.

PARAMOUNT PICTURES THEATRES CORPORATION, a Corporation,

Plaintiff,

vs.

PARTMAR CORPORATION, a Corporation, and FANCHON & MARCO, INC., a Corporation,

Defendants and
Third-Party Plaintiffs,

vs.

PARAMOUNT PICTURES, INC.; PARAMOUNT FILM DISTRIBUTING CORPORATION, LEONARD GOLDENSON, CHARLES REAGAN, SAM DEMBOW, JR., ADOLPH ZUKOR, BARNEY BALABAN and Y. FRANK FREEMAN,

Third-Party Defendants.

ANSWER AND COUNTERCLAIM OF DEFENDANTS PARTMAR CORPORATION,

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A CORPORATION, AND FANCHON & MARCO, INC., A CORPORATION, TO PLAINTIFF'S COMPLAINT

First Defense

1. The complaint fails to state any claim on which relief can be granted.

Second Defense

2. The United States of America is a necessary party to this action, because the relief prayed for by the plaintiff will defeat the right of the United States of America to the relief sought in United States of America v. Paramount Pictures, Inc., et al., Equity No. 87-273, in the United States District Court for the Southern District of New York, and to the relief granted in a judgment entered in that case on December 31, 1946.

Third Defense

3. The defendants admit the allegations of paragraphs 2, 3, 4, 5, 7, 9 and 11. Deny the allegations of paragraphs 6, 10, 12, 13, 14, 15 and 16. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 1 and 8.

As to the Second Cause of Action

4. In answer to paragraphs 1, 4 and 6 of plaintiff's second cause of action, these defendants make the same answers to those paragraphs realleged as made to the first cause of action.

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5. These defendants admit the allegations of paragraphs 2 and 3, and deny the allegations of paragraph 5.

As to the Third Cause of Action

6. In answer to paragraph 1 of plaintiff's third cause of action, these defendants make the same answers to those paragraphs realleged as made to the first cause of action.

7. Admit the allegations of paragraph 2, except insofar as said paragraph is denied by the defendants' counterclaim and deny the allegations of paragraph 4. The defendants are without knowledge or information sufficient to form a belief as to the truth of the [38] allegations contained in paragraph 3.

As to the Fourth Cause of Action

8. In answer to paragraph 1 of plaintiff's fourth cause of action, these defendants make the same answers to those paragraphs realleged as made to the first and third causes of action.

9. These defendants admit the allegations of paragraphs 2, 3 and 5, but deny that there is any sum due from Fanchon & Marco to the plaintiff for rental, costs, expenses, attorneys' fees, unpaid balance of principal or accrued interest on said note, or any other sums as provided in said lease, or otherwise. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4.

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As to the Fifth Cause of Action

10. In answer to paragraph 1 of plaintiff's fifth cause of action, these defendants make the same answers to those paragraphs realleged as made to the first cause of action.

11. Admit the allegations of paragraph 2.

Fourth Defense

12. Paramount Pictures Theatres Corporation, Paramount Pictures, Inc.; Paramount Film Distributing Corporation, Leonard Goldenson, Charles Reagan, Sam Dembow, Jr., Adolph Zukor, Barney Balaban and Y. Frank Freeman (hereinafter called third-party defendants), and the defendants in United States of America v. Paramount Pictures, Inc., et al., Equity No. 87-273, in the United States District Court for the Southern District of New York, and other persons to the defendants unknown, were, at the time of the acts and transactions stated in the complaint herein, and they now are, engaged in a conspiracy in restraint of trade and commerce among the States, in the distribution and exhibition of motion pictures, in violation of the Act of Congress of July 2, 1890; entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and [39] Monopolies"; that is to say, the same conspiracy stated in the complaint in that case.

13. On or about March 2, 1933; August 7, 1934; August 30, 1939, and January 18, 1943, Paramount Pictures Distributing Company and Paramount Pictures, Inc., entered into contracts with Partmar

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Corporation granting to Partmar Corporation licenses to exhibit at the Paramount Theatre, Los Angeles, California, photoplays made and released by Paramount Pictures, Inc., and Paramount Film Distributing Corporation, from March 2, 1933, to March 18, 1952. These contracts will be hereinafter called film franchises.

14. On or about March 2, 1933; August 7, 1934; August 30, 1939, and January 18, 1943, Paramount Pictures, Inc., entered into contracts with the defendants leasing the Paramount Theatre to Partmar Corporation, from March 2, 1933, to March 18, 1952.

15. From March 2, 1933, to the present time Partmar Corporation has been receiving photoplays from Paramount Pictures, Inc., and Paramount Film Distributing Corporation for exhibition at the Paramount Theatre; has been in possession of the Paramount Theatre; and has been there engaged in the business of exhibiting photoplays.

16. As part of the aforesaid conspiracy, the plaintiff and the third-party defendants, arranged and agreed among themselves, to include in the leases a statement to the effect that if, prior to March 18, 1952, the film franchises should be terminated, the lessor should have an option to terminate the lease, dispossess Partmar Corporation and recover possession of the Paramount Theatre. They further arranged and agreed to use that statement for the purpose of dispossessing Partmar Corporation and recovering possession of the Paramount

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Theatre, if performance of any of the film franchises should be enjoined because of the aforesaid conspiracy.

17. This action has been brought by the plaintiff in [40] pursuance of the aforesaid conspiracy, arrangements and agreements, and to evade and defeat the purpose to end the aforesaid conspiracy and restraint of trade for which United States of America v. Paramount Pictures, Inc., et al., Equity No. 87-273, was instituted.

18. As part of the aforesaid conspiracy, the plaintiff and the third-party defendants, arranged and agreed among themselves, to require Partmar Corporation to license for exhibition at the Paramount Theatre for 46 weeks of each year, only photoplays made and released by Paramount Pictures, Inc., and, for any failure upon the part of Partmar Corporation to obey that requirement, to evict it from the Paramount Theatre. The plaintiff and the third-party defendants have continuously and fully enforced the exclusive licensing requirement, except that other photoplays have been licensed for exhibition at the Paramount Theatre at the request and with the consent of the plaintiff.

19. Because of the exclusive licensing requirement, and the conspiracy, arrangements and agreements aforesaid, the plaintiff and the third-party defendants, have been able to impose, and they have in fact imposed, upon Partmar Corporation, excessive terms, conditions and charges for the photoplays made and released by them and exhibited at

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the Paramount Theatre, from March 2, 1933, to the present time.

20. Said terms, conditions and charges have exceeded fair, reasonable and lawful terms, conditions and charges in a large amount, to wit, $500,000.

Fifth Defense

21. The defendants reincorporate and reallege in their fifth defense paragraphs 12 to 15 of their fourth defense, the same as though specifically repleaded and realleged herein.

22. The term stipulated in the lease of August 30, 1939, was for ten years and to terminate on August 31, 1949. Fixed weekly [41] amounts or specified percentages of the gross receipts of Partmar Corporation at the Paramount Theatre, whichever should be the greater sums, were stipulated in the lease to be paid by Partmar Corporation during the full term of the lease. On or about May 1, 1942, the plaintiff and the third-party defendants arranged and agreed among themselves, to compel Partmar Corporation to pay an additional sum; that is to say, fifty per cent of the net receipts of Partmar Corporation at the Paramount Theatre.

23. The plaintiff and the third-party defendants arranged and agreed to refuse to furnish photoplays to Partmar Corporation for exhibition at the Paramount Theatre, and to attempt to evict Partmar Corporation from the Paramount Theatre, unless Partmar Corporation should pay in addition

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to the rental stated in the lease fifty per cent of the net receipts of the operation of the theatre.

24. The plaintiff thereupon demanded that Partmar Corporation pay to it, in addition to the rental stipulated in the lease, fifty per cent of the net receipts of the operation of the theatre, as a consideration for continuing to furnish photoplays necessary for the continued operation of the Paramount Theatre, and for continued performance by the plaintiff of the lease and forebearance by it from instituting and maintaining actions to evict Partmar Corporation from the Paramount Theatre.

25. For the purpose of procuring the continued furnishing of photoplays for the operation of the Paramount Theatre, and for the purpose of procuring the forebearance by plaintiff and the third-party defendants from the breaches of contract, as aforesaid, Partmar Corporation has made periodical payments of fifty per cent of the net receipts of the operation of the Paramount Theatre. Said payments have amounted to approximately $600,000, as of March 31, 1947. Unless this action shall be dismissed and the plaintiff enjoined as hereinafter prayed, future payments of fifty per cent of [42] the net receipts of the operation of the theatre will increase this amount to approximately $1,000,000.

Sixth Defense

26. That under the terms of Article II of that said lease made and executed by and between Paramount Pictures, Inc., as lessor and Partmar Cor-

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poration as lessee, dated January 1, 1939, executed and delivered on the 30th day of August, 1939, and by Article IIa of the extension of said lease made and executed between the said parties on the 1st day of September, 1942, the defendant, Partmar Corporation, caused an audit to be made by a certified public accountant to determine the deductions allowable to this defendant under the provisions of this lease for the purpose of determining rental in accordance therewith; that lessor expressed its dissatisfaction concerning said audit, and pursuant to the right of the lessor under the terms of the lease, the plaintiff caused an independent audit to be made, which was not mutually agreeable to the parties. That in accordance with the terms of said lease, and the amendment thereto as hereinabove alleged, an audit was made by Messrs. Price Waterhouse & Company and under said audit the amount of the percentage rent was ascertained in accordance with the method prescribed in said lease. That in accordance with the terms of said lease the audit made by Messrs. Price Waterhouse & Company was to be used as the basis for determining the amount of the percentage rent. That according to the audit prepared by Messrs. Price Waterhouse & Company there was an overpayment of rent for the years 1944-45 made to the plaintiff on behalf of this defendant in the sum of $10,666.71. That according to the determination of said audit by Messrs. Price Waterhouse & Company for the year 1945-46 there was shown to be an overpayment of rent made by defendant Partmar to the plaintiff in the sum of

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$24,250.86. That in determining the amount of gross receipts for the purpose of arriving at the rent figure for [43] the year 1946-47, as provided in said lease, this defendant used the accounting methods which had been employed by Messrs. Price Waterhouse & Company in the preparation of their audit for the years 1944-45 and 1945-46, and there was found that at the close of the books for the quarter ending March 31, 1947, that there had been an overpayment of rent by this defendant to the plaintiff in the sum of $12,955.71. That demand has been made by this defendant upon plaintiff for the repayment of said sums as hereinabove alleged, but that the plaintiff has failed and refused to make such payments and there is now due, owing and unpaid to this defendant from the plaintiff, the sum of $47,873.28.

First Counterclaim

27. Paramount Pictures Theatres Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Leonard Goldenson, Charles Reagan, Sam Dembow, Jr., Adolph Zukor, Barney Balaban and Y. Frank Freeman, and the defendants in United States of America v. Paramount Pictures, Inc., et al., Equity No. 87-273, in the United States District Court for the Southern District of New York, and other persons to the defendants unknown, were, at the time of the acts and transactions stated in the complaint herein, and they now are, engaged in a conspiracy in restraint of trade and commerce among the States, in the dis-

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tribution and exhibition of motion pictures, in violation of the Act of July 2, 1890, that is to say, the same conspiracy stated in the complaint in that case.

28. On or about March 2, 1933; August 7, 1934; August 30, 1939, and January 18, 1943, Paramount Pictures Distributing Company and Paramount Pictures, Inc., entered into contracts with Partmar Corporation granting to Partmar Corporation licenses to exhibit at the Paramount Theatre, Los Angeles, California, photoplays made and released by Paramount Pictures, Inc., and Paramount Film Distributing Corporation, from March 2, 1933, to March 18, 1952. [44] These contracts will be hereinafter called film franchises.

29. On or about March 2, 1933; August 7, 1934; August 30, 1939, and January 18, 1943, Paramount Pictures, Inc., entered into contracts with the defendants leasing the Paramount Theatre to Partmar Corporation, from March 2, 1933, to March 18, 1952.

30. From March 2, 1933, to the present time Partmar Corporation has been receiving photoplays from Paramount Pictures, Inc., and Paramount Film Distributing Corporation, for exhibition at the Paramount Theatre; has been in possession of the Paramount Theatre; and has been there engaged in the business of exhibiting photoplays.

31. As part of the aforesaid conspiracy, the plaintiff and the third-party defendants arranged

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and agreed among themselves, to include in the leases a statement to the effect that if, prior to March 18, 1952, the film franchises should be terminated, the lessor should have an option to terminate the lease, dispossess Partmar Corporation and recover possession of the Paramount Theatre. They further arranged and agreed to use that statement for the purpose of dispossessing Partmar Corporation and recovering possession of the Paramount Theatre, if performance of any of the film franchises should be enjoined because of the aforesaid conspiracy.

32. This action has been brought by the plaintiff in pursuance of the aforesaid conspiracy, arrangements and agreements, and to evade and defeat the purpose to end the aforesaid conspiracy and restraint of trade for which United States of America v. Paramount Pictures, Inc., et al., Equity No. 87-273, was instituted.

33. As part of the aforesaid conspiracy, the plaintiff and the third-party defendants arranged and agreed among themselves, to require Partmar Corporation to license for exhibition at the Paramount Theatre for 46 weeks of each year, only photoplays made and released by Paramount Pictures, Inc., and, for any failure upon the part of Partmar Corporation to obey that requirement, to evict it from Paramount Theatre. The plaintiff, and the third-party defendants [45] have been able to impose, and they have in fact imposed, upon Partmar Corporation, excessive terms, conditions and charges

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for the photoplays made and released by them and exhibited at the Paramount Theatre, from March 2, 1933, to the present time.

34. Said terms, conditions and charges have exceeded fair, reasonable and lawful terms, conditions and charges in a large amount, to wit, $1,250,000. The defendants have been injured and damaged in their business and property by the acts and transactions aforesaid in the sum of $1,250,000.

Second Counterclaim

35. The defendants reincorporate and reallege in their second counterclaim paragraphs 27 to 30 of their first counterclaim the same as though specifically repleaded and realleged herein.

36. The term stipulated in the lease of August 30, 1939, was for ten years and to terminate on August 31, 1949. Fixed weekly amounts or specified percentages of the gross receipts of Partmar Corporation at the Paramount Theatre, if the percentages should be greater than the fixed weekly amounts, to be paid by Partmar Corporation during the full term of the lease, were agreed to in the lease. On or about May 1, 1942, the plaintiff and the third-party defendants arranged and agreed among themselves, to compel Partmar Corporation to pay an additional sum; that is to say, fifty per cent of the net receipts of Partmar Corporation at the Paramount Theatre.

37. The plaintiff and the third-party defendants arranged and agreed to refuse to furnish pho-

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toplays to Partmar Corporation for exhibition at the Paramount Theatre, and to attempt to evict Partmar Corporation from the Paramount Theatre, unless Partmar Corporation should pay, in addition to the rental stated in the lease, fifty per cent of the net receipts of the operation of the theatre.

38. The plaintiff thereupon demanded that Partmar Corporation pay to it, in addition to the rental stipulated in the lease, [46] fifty per cent of the net receipts of the operation of the theatre, as a consideration for continuing to furnish photoplays necessary for the continued operation of the Paramount Theatre, for continued performance by the plaintiff of the lease and forebearance by it from instituting and maintaining actions to evict Partmar Corporation from the Paramount Theatre.

39. For the purpose of procuring the continued furnishing of photoplays, for the operation of the Paramount Theatre, and for the purpose of procuring the forebearance by plaintiff and the third-party defendants from the breaches of contract, as aforesaid, Partmar Corporation has made periodical payments of fifty per cent of the net receipts of the operation of the Paramount Theatre. Said payments have amounted to approximately $600,000, as of March 31, 1947. Unless this action shall be dismissed and the plaintiff enjoined as hereinafter prayed, future payments of fifty per cent of the net receipts of the operation of the theatre will increase this amount to approximately $1,000,000. The defendants have been injured and damaged in their

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business and property by the acts and transactions aforesaid in the sum of $1,000,000.

Third Counterclaim

40. That under the terms of Article II of that said lease made and executed by and between Paramount Pictures, Inc., as lessor and Partmar Corporation as lessee, dated January 1, 1939, executed and delivered on the 30th day of August, 1939, and by Article IIa of the extension of said lease made and executed between the said parties on the 1st day of September, 1942, the defendant, Partmar Corporation, caused an audit to be made by a certified public accountant to determine the deductions allowable to this defendant under the provisions of this lease for the purpose of determining rental in accordance therewith; that lessor expressed its dissatisfaction concerning said audit, and pursuant to the right of the lessor under the terms of the lease, the plaintiff caused an independent [47] audit to be made, which was not mutually agreeable between the parties. That in accordance with the terms of said lease, and the amendment thereto as hereinabove alleged, an audit was made by Messrs. Price Waterhouse & Company and under said audit the amount of the percentage rent was ascertained in accordance with the method prescribed in said lease. That in accordance with the terms of said lease the audit made by Messrs. Price Waterhouse & Company was to be used as the basis for determining the amount of the percentage rent. That according to the audit

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prepared by Messrs. Price Waterhouse & Company there was an overpayment of rent made to the plaintiff on behalf of this defendant in the sum of $10,666.71. That according to the determination of said audit by Messrs. Price Waterhouse & Company for the year 1945-46 there was shown to be an overpayment of rent made by this defendant to the plaintiff in the sum of $24,250.86. That in determining the amount of gross receipts for the purpose of arriving at the rent figure for the year 1946-47, as provided in said lease, this defendant used the accounting methods which had been employed by Messrs. Price Waterhouse & Company in the preparation of their audit for the years 1944-45 and 1945-46, and there was found that at the close of the books for the quarter ending March 31, 1947, that there had been an overpayment of rent by this defendant to the plaintiff in the sum of $12,955.71. That demand has been made by this defendant upon plaintiff for the repayment of said sums as hereinabove alleged, but that the plaintiff has failed and refused to make such payments and there is now due, owing and unpaid to this defendant from the plaintiff, the sum of $47,873.28, and that further sums for overpayment of rent will accrue subsequent to March 31, 1947.

Wherefore, the defendants pray:

1. That the complaint be dismissed.

2. That the persons and corporations named in paragraph 1 of the fourth defense, be summoned to appear herein as third-party [48] defendants, and

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make such defenses as they may have to the counterclaims stated herein.

3. That the amount of $47,872.28 and such further sums as have accrued subsequent to March 31, 1947, be set off against any claim of any notes or other obligation which the plaintiff may have against the defendants.

4. That the defendants have judgment for damages under their first counterclaim in the sum of $3,750,000 with interest, costs and a reasonable attorneys' fee.

5. That defendants have judgment for damages under their second counterclaim in the sum of $3,000,000, with interest, costs and a reasonable attorneys' fee.

6. That the defendants have judgment for the amount claimed in their third counterclaim, to wit, in the total amount of $47,873.28, and such further sums as have accrued subsequent to March 31, 1947, with interest.

7. That the plaintiff be enjoined from further collection and receipt of fifty per cent of the net receipts of the operation of the Paramount Theatre.

8. That the plaintiff and the third-party defendants be enjoined from further engaging in the conspiracy in restraint of trade and commerce among the States in the distribution and exhibition of motion pictures, and from engaging in any acts and transactions in pursuance thereof relative to or

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injurious to the defendants in their business and property, and in the operation of the Paramount Theatre.

9. That the defendants be granted such other and further relief as may be necessary and appropriate.

MACFARLANE, SCHAEFER
& HAUN,
HENRY SCHAEFER, JR.,
WILLIAM P. GAMBLE,
JAMES H. ARTHUR,

By /s/ HENRY SCHAEFER, JR.,
Attorneys for Defendants and
Third-Party Plaintiffs.

RUSSELL HARDY,
Of Counsel.

[Endorsed]: Filed July 10, 1947. [49]

[Title of District Court and Cause.]

ORDER

Plaintiff's motion for separate trials, defendants' motion for continuance of pretrial hearing, defendants' motion to produce, and pretrial hearing in the above-entitled matter came on [122] for hearing on April 26, 1948; the motions were argued by respective counsel; the pretrial hearing was conducted; and good cause appearing therefor;

It Is Ordered as follows:

1. Plaintiff's motion for separate trials is hereby

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granted and trial of the first, second and fifth causes of action set forth in the complaint on file herein is hereby set for July 6, 1948, at 10:00 o'clock a.m.; trial of the issue of damages for defendants' alleged wrongful withholding to follow the trial of said first, second and fifth causes of action; and the trial of defendants' counterclaims to follow said prior trials.

2. Defendants' motion to continue the pretrial hearing is hereby denied; but further pretrial hearing is hereby ordered for June 7, 1948, at 10:00 o'clock a.m.;

3. Defendants' motion to produce documents is hereby continued for further hearing on June 7, 1948, at 10:00 o'clock a.m.

Done in Open Court April 26, 1948.

/s/ WM. C. MATHES,
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed April 29, 1948. [123]

[Title of District Court and Cause.]

BRIEF FOR DEFENDANTS

The Franchise Does Not Violate the Sherman Act

Prior to the decision of the Supreme Court reversing the judgment of December 31, 1946, the position of the plaintiff was that the franchise had

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been terminated by that injunction, and that the only question for decision was simply whether the injunction applied to the franchise. After the reversal of that judgment, the plaintiff took the position that the question presented was whether the franchise was violative of the Sherman Act, wholly apart from any judgment or the decisions of the District and Supreme Courts. We believe this case was not dismissed after the reversal of the judgment on which it was based, because the Court agreed with the plaintiff.

In a word, the plaintiff contends that the legality of the franchise is to be decided as if the government case had never existed, and that the only significance of the decisions of the District and Supreme Courts, is as precedents in a different but similar case.

Plaintiff has variously stated the position as follows: "Your Honor must independently determine whether the Act of Congress rendered such an agreement as this illegal" (Transcript, April 26, 1948, p. 13). "The legality or illegality of said franchise agreement must be determined by Your Honor in this action" (Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 2); "this Court must determine the inherent validity or invalidity of the Paramount-Partmar franchise, wholly apart from the decree in the Government Case" (Plaintiff's Reply to Brief for Defendants on Motions for Summary Judgment, p. 1); and apart from the formal decree,

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apart from any adjudication, the franchise is illegal (T. 154). According to the plaintiff, this Court must decide this case by "an independent process of reasoning influenced primarily by the opinion of the Supreme Court" (Plaintiff's Trial Memorandum, p. 24), but as if Paramount had not been a party to the Government suit, and as if this particular franchise, and the clearance and admission price and [287] other provisions, had not been involved.

In proceedings in this case prior to the trial, this Court has stated its view of the significance of the government case as follows: "merely a precedent," a "mere declaration of law" by the New York Court (Transcript, September 8, 1947, p. 130); "I am at a loss still to understand what the New York action has to do with this case unless it is merely to set a precedent which we can follow here," and "But here, the question is, was this franchise agreement legal or illegal under the Sherman Act. That is a question to be determined here, not in New York or somewhere else * * *" (Transcript, June 7, 1948, p. 3).

If this be the correct view of the Paramount case, this suit involves an original de novo action under the Sherman Act, and the burden is upon the plaintiff to plead and prove every essential element of such an action, including conspiracy and monopolization, the existence of trade and commerce among the several States, the application of the conspiracy or monopolization to that trade, and un-

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reasonable restraint thereof. We wish to note that we do not consider the Paramount Case by any means a mere precedent.

No interstate commerce has been alleged or proved. Allegation and proof of the existence of the commerce restrained, is an essential element. In a direct action under the anti-trust laws, to recover treble damages or injunction, allegation and proof of interstate commerce is essential for two reasons: (1) to support the jurisdiction of the federal court, and (2) as the subject matter of the action, as that which has been restrained or monopolized. We do not contend that it was necessary for plaintiff to establish interstate commerce for the first reason, the jurisdiction of the court being based on diversity of citizenship. We do contend, however, that no violation of the statute can be shown without proof of interstate commerce in all respects as if the action were brought directly under the Sherman Act for the relief granted by that [288] act.

The existence of no commerce at all has been shown in this case. Indeed, the plaintiff has not even attempted to do so. Inferentially, there is indicated commerce in licensing motion pictures between Paramount and Partmar and other exhibitors located in the City of Los Angeles and the metropolitan area, all parts of which are within California. There is no indication of the movement of anything across state lines into or from California. If it is permissible to draw any conclusion from the

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evidence, it is that the pictures have been made in the City of Los Angeles, and that the films have been moved merely from one place in the city to theatres in the city and nearby places.

We have been unable to find any decided case in which parties have had the termerity to urge a court they were not required to allege and prove the existence of trade and commerce of some character, local, intrastate or interstate case. In the decided cases, allegation and evidence of some commerce has invariably been present, and the questions have been whether the commerce was interstate in character, whether the evidence was sufficient, etc. As stated in Peto v. Howell, 101 F. 2d 353 CCA 7, 1939:

> "Monopolies, as such, the federal government has no control over; only when a monopoly of some part of interstate commerce is involved does jurisdiction attach to the federal government. Consequently, it must be that Congress, in speaking of monopolies of any part of interstate commerce, must have had in mind such restraints of such part of that commerce as bring about an extraordinary control of any part of the commodities in the stream of commerce." (P. 359.)

> "the trade or commerce restrained or monopolized or attempted to be monopolized must be interstate or international. The statute expressly so says, and, whatever its phraseology, it must be so construed if it is to stand, [289]

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since it is only such trade and commerce that congress has authority to regulate * * *"

Dueber Watch Co. v. Howard Watch Co.,
55 F. 851; 66 F. 637, CCA 2, 1895.

"It should therefore appear directly, and not by way of inference, that the acts of the defendants, or their attempts to monopolize interstate commerce, resulted in its restraint or monopoly."

Ibid. 66 F. 646.

"It must appear that any injury to plaintiff was caused by interference with his interstate business."

Holland v. Majestic Radio Corp.,
27 F. Supp. 990.

"commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."

Swift v. U. S.,
196 U. S. 375, 399;

Lemke v. Farmers' Grain Co.,
258 U. S. 50;

United States v. Yellow Cab Co.,
332 U. S. 218.

The motion picture business in the City of Los Angeles and nearby areas is not interstate commerce, in the absence of evidence to the contrary.

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Binderup v. Pathe Exchange,
263 U. S. 291, 301-303;

Swift & Co. v. United States,
196 U. S. 375, 397;

Blumenstock v. Curtis Pub. Co.,
252 U. S. 436.

"It would be an extravagant consequence to draw from Hanley v. Kansas City Southern Ry., 187 U. S. 617, a case of a State attempting to fix rates over a railroad route passing outside its limits, that the contract was within the Sherman Act because the boats referred to might sail over soil belonging to Kentucky in passing between two Ohio points."

Cincinnati Packet Co. v. Bay,
200 U. S. 179, 183;

United States v. Crescent Amusement Co.,
323 U. S. 173. [290]

"It seems clear that we have nothing more than a local price cutting war having no effect or impact upon interstate commerce and placing no burden upon the same."

Moore v. Mead,
184 F. 2d 338 CA 10, 1950;

KVOS v. Associated Press,
299 U. S. 269, 277;

The Wiswall v. Scott,
86 F. 671 CCA 2, 1898;

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Spencer v. Sun Oil Co.,
94 F. Supp. 408 DC, 1950.

There was no allegation or proof of conspiracy. There being no showing of interstate commerce, it is immaterial whether there was conspiracy, unreasonable clearance, fixed admission prices, block booking, or unreasonable restraint. In the absence of interstate commerce, all else was entirely beyond the purview of the Sherman Act. But, assuming that there had been no failure to prove interstate commerce, the absence of conspiracy is equally fatal. Probably the only evidence relative to conspiracy was the statement of Y. Frank Freeman, a witness for Paramount, that there were no conspiratorial arrangements between Paramount and Fox West Coast. (T. 2369-2370, 2390, 2395.)

Even in a setting of conspiracy, it is doubtful that the franchise would be unlawful. In the Paramount Case, franchises were attacked as one of many parts of a conspiracy in restraint of trade, and the Supreme Court considered franchises in the atmosphere and environment of unlawful conspiracy. But that Court said, and the reference applied to this identical franchise, "we cannot say on this record that franchises are illegal" (334 U. S. 156). It appears, therefore, that the Court did not consider that the rule in anti-trust cases that the vice is in the combination and that the unlawful plan makes the parts unlawful, tainted the franchises. The effect of the opinion seems to be that franchises are not unlawful per se, that is, apart

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from conspiracy, and that on the record in that case they were not shown to have been parts of the conspiracy. [291]

The Supreme Court, while probably not approving, clearly refrained from condemning franchises, whether with defendants, non-defendants or circuits. As to the effect of franchises, the Court referred to mere probabilities, as that franchises between defendants "might" be used to restrain trade, that franchises "may have been" used to discriminate against independents, and that franchises often contained discriminatory clauses in favor of defendants and large circuits. The cloud in which franchises reached the Supreme Court and in which they were returned by it to the trial court for clarification, has never been dispelled by that Court, at least so far as the Paramount franchises were concerned. The District Court has not thereafter considered, found or concluded that the effect of the Partmar or any other Paramount franchise was to discriminate against anyone. The consent judgment of March 4, 1949, obviated and denied that.

The Supreme Court seems at least to have clearly indicated that a franchise with one exhibitor for one theatre, like that with Partmar, was not involved in the case. It said in effect that only franchises with defendants and franchises for theatres in a circuit were involved.

In United States v. Reading Co., 226 U. S. 324, the Supreme Court said that lawful acts became vio-

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lative of the anti-trust laws only because of combination and conspiracy, as follows:

> "But if the defendant carriers did, as we have found to be the fact, combine to restrain the freedom of interstate commerce either in the transportation or in the sale of anthracite coal in the markets of other States, and adopted as a means for that purpose the Temple Company, and through it, the control of the great Simpson & Watkins collieries, the parts of the general scheme, however lawful considered alone, become parts of an illegal combination under the federal statute * * * The evil is in the combination." (Pp. 353-354.) [292]

In Swift & Co. v. United States, 196 U. S. 396, the court referred to the necessity of conspiracy as follows:

> "The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful." (P. 396.)

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Binderup v. Pathe Exchange, 263 U. S. 291, 312:

> "each of the distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act, but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the exhibitor. See United States v. Schrader's Son, Inc., 252 U. S. 85, 99; Bobbs-Merrill Co. v. Straus, 139 Fed. 155, 191.

United States v. Crescent Amusement Co., 323 U. S. 173, 184:

> "We may assume that if a single exhibitor launched such a plan of economic warfare he would not run afoul of the Sherman Act. But the vice of the undertaking was the combination of several exhibitors in a plan of concerted action."

Ball v. Paramount,
169 F. 2d 317, 319.

To the same effect:

American Tobacco Co. v. United States,
328 U. S. 781, 810, 1946; [293]

United States v. Bausch & Lomb,
321 U. S. 707, 723;

Westway Theatre v. Fox,
30 F. Supp. 830, 835:

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"Thus where the clearances are established as a result of combination or conspiracy of numerous distributors or exhibitors or both, they have been held invalid. Youngclaus v. Omaha Film Board of Trade, D. C., 60 F. 2d 538. See also First Nat. Pictures, Inc., v. Robison, 9 Cir., 72 F. 2d 37; Vitagraph, Inc., v. Perelman, 3 Cir., 95 F. 2d 142. But where the clearance results only from private contract between a distributor and an exhibitor, without unusual features, the provision has been upheld. Rolsky v. Fox Mid West Theatres, supra. See also Peoples Film Co. v. Minneapolis Film Board of Trade, D. C. Minn., 1936, and provision of consent decree in United States v. Balaban & Katz, D. C. N. D. Ill., 1932, Vol. 7, Fordham Law Rev., p. 199; Vol. 36, Columbia Law Rev., p. 646.

To the same effect:

Carter-Crume v. Peurrung,
86 F. 439;

Federal Trade Commission v. Gratz,
253 U. S. 421, 428-429;

United States v. Colgate,
250 U. S. 300;

United States v. Schrader,
252 U. S. 85 [294]

The Sherman Act has no application to the admission price agreement on the evidence in this case. In the absence of interstate commerce and

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conspiracy, the agreement on admission prices is perfectly lawful. Wholly apart from the government case against Paramount, as postulated by the plaintiff, the action on admission prices was permissible. The evidence in this case shows at most nothing more than one agreement on admission prices between one film company and one exhibitor applicable to one theatre. What the prices were at other theatres in the same area at the same time, is not shown. Whether the prices were established and applied pursuant to any contact and agreement among the other film companies and the other theatres, is not shown. None of the pleadings, evidence, findings and conclusions in the government case relative to admission prices, were offered and received in this case. In fact, it was argued by Paramount and ruled by the Court in this case (probably correctly), "that the rule of law is that the evidence, the documents, the pleadings in a government equity suit are not admissible under section 5 of the Clayton Act or otherwise, in a private action between other parties" (T. 2156, 2192).

There is no evidence in this case of the facts found in the government case as to admission prices; that is, there is no evidence that the film companies, including Paramount, had agreed with all licensees upon minimum admission prices, that the prices were in general uniform, nor that the licenses were in effect price fixing arrangements among all of the film companies, nor that there was a "system" of determining minimum admission prices in all theatres where feature motion pictures were exhib-

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ited, nor that the film companies conspired among themselves to maintain a nation-wide system of fixed admission prices. (70 F. Supp. 60, 61, 72, findings 62-65, 70, 72.) [295]

The admission price provisions applied only to part of the business of the theatre. It applied only to the exhibition of Paramount pictures, which, from 1939 to 1946 were used during 76 per cent of the playing time, and were 83.5 per cent of the pictures used. In other words, 14 per cent of the playing time and 16.5 per cent of the pictures were not within the price provisions.

The provision had no application to prices for children, which represented approximately ten per cent of the total admission receipts. It was disregarded by Partmar as to Patrons in the armed services, all or most of whom were adults. (Pl. Ex. 114.)

A single contract between one film company and one exhibitor, is not violative of the Sherman Act. While a system of contracts between one vendor and many vendees, and applying to a large trade in its entirety, as to the price at which a commodity is to be resold (to which the system of admission prices is analogous), may be violative of the anti-trust laws, in no reported case that we can find, has it been ruled that a single such contract is not permissible.

In Park v. Hartman, 153 F. 24 CCA 6, 1907, the Court distinguished a system of resale price con-

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tracts between one vendor and many vendees, and a single contract between one vendor and one vendee, as follows:

> "Each involved only a single transaction by which the article was sold upon an agreement that the purchaser would not resell at less than a named price. Neither concerned any other rights than those of the contracting parties, and neither decides more than that an agreement of sale of a chattel by which the purchaser agrees that he will not sell below a certain price is valid and not such a restraint of trade as to be obnoxious to the law" (p. 37). [296]

In United States v. Colgate, 250 U.S. 300, a system of resale price fixing, contracts applicable to a large trade, on a nation wide scale, and to many vendees, was upheld, where the vendor had merely suggested the prices and refused to deal with those who ignored the suggestion, although the suggestion was wholly effective, saying "In the absence of any purpose to create or maintain a monopoly the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." (p. 307)

In United States v. General Electric Co., 272 U.S. 476, 489, a single contract requiring a licensee under a patent to make sales of the patented article at prices named by the licensor, was upheld as not obnoxious to the Sherman Act.

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In the Paramount Case the trial court distinguished a system of admission prices fixed by conspiracy, from a single license controlling admission prices. It said:

> "But that act has never been held to sanction a conspiracy among licensors and licensees artificially to maintain prices . . . nor need we now decide whether a copyright owner may lawfully fix admission prices to be charged by a single independent exhibitor for the exhibition of its film, if other licensors and exhibitors are not in contemplation. (United States v. Paramount, 66 F. Supp. 340.)

In United States v. Paramount, 334 U.S. 131, 143, 144, the Court dealt, not with a single contract on admission prices, but with a system of such contracts to "regiment an entire industry" on admission prices. As to a single contract, it said "The case where a distributor fixes admission prices to be charged by a single independent exhibitor, no other licensees or exhibitors being in contemplation, seems to be wholly academic." On the evidence in this case, however, the reverse is true and the question is [297] whether a single contract is permissible. Whether a system of such contracts is unlawful is wholly academic.

The agreement on admission prices is lawful under the California statute.

The California statute declares that—

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"(a) No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others violates any law of this state by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor. (Section 16902, Deering's Business and Professions Code, Div. 7, Pt. 2, Chap. 3.)

Section 16901 states that "Commodity means any subject of commerce."

The franchise describes the pictures to which it applies as those "under the trademark 'Paramount.'" (Pl. Ex. 3, p. 3.)

The plaintiff has introduced no evidence to show that the pictures were not "in fair and open competition" with pictures of other companies. [298]

Wholly Apart From the Paramount Case, the Franchise Does Not Restrain Trade and Is Not Violative of the Sherman Act

The complaint describes the franchise as a contract by which "Partmar convenanted and agreed to exhibit all said motion pictures produced and released by Paramount Pictures." (Complaint, p. 6, lines 6-8.) According to the complaint, Partmar

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was given the exclusive right to all of the Paramount pictures for the duration of the contract. The franchise is thus likened to an exclusive dealing contract. The essential element of the franchises described in the injunction is the right to "all" of the pictures of a film company; but, as the evidence shows, the Partmar franchise neither in terms nor in practice, applied to all of the pictures.

None of the general criticisms of franchises stated by the District Court, and indicated as probable by the Supreme Court in the Paramount Case, but not embodied in the injunctions, apply to the Paramount-Partmar franchise. Those criticisms were that the franchises (1) contain discriminatory clauses favoring theatres of defendants and large circuits, (2) strengthen the strategic position of defendants, (3) discriminate among independents, (4) tie up the distribution of films, and (5) restrict competition by independents to obtain pictures. The evidence fails to show that the franchise, in terms or in practice, is subject to these objections. Indeed, it is much less subject to these objections than other contracts which represent a lawful choice of those with whom one deals.

We can find no decided case in which a contract like the Paramount-Partmar franchise has been dealt with, except the government case. Plaintiff likewise cites no case on the subject, except the government case, that case being the only one cited by plaintiff against the validity of the franchise. United States v. Crescent Amusement Co., 323 U.S.

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173, and Schine v. United States, [299] 334 U.S. 110, appear to be the only other cases dealing with franchises. In those cases franchises in the plural were condemned as violative of the antitrust laws, but only as parts of a melange of monopolistic and conspiratorial practices, on the part of exhibitors who were shown to hold a strong and dominating position in the trade.

In Schine v. United States, 334 U. S. 110 the largest independent exhibitor in the country, with more than 148 theatres, procured by the use of unlawful monopoly power many franchises from the major film companies for the use of pictures in all of the theatres in the circuit. The Court said that as part of the unlawful monopoly power, Schine had procured the franchises:

> "when Schine's buying power was used to acquire films produced by a distributor for two or three years rather than for one year alone, it plainly strengthened through the exercise of monopoly power such dominant position as Schine had over each of its competitors." (P. 118.)

United States v. Schine,
63 F. Supp. 238

In United States v. Crescent Amusement Co., 323 U.S. 173, franchises of an exhibitor operating theatres in seventy towns in five States and applicable to all the theatres, procured by the un-

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lawful monopoly power of the exhibitor and as parts of a conspiracy, were held unlawful.

Even if the franchise were an exclusive dealing contract, it would not be violative of the federal antitrust laws.

Every binding contract of sale restricts in some degree the freedom of the contracting parties, and the same is true, of course, of every motion picture exhibition license. An ordinary contract or license, however, is very different from an exclusive license. A single exclusive license is very different also from a system of exclusive licenses. A system of such licenses by one licensor distributing less than twelve per cent of the feature pictures acting [300] alone (Df. Ex. 4), is very different from a system of such contracts used by one who has a dominating or monopoly position in the trade, or applied by all or almost all of the licensors pursuant to a conspiracy.

No case has held that a single exclusive dealing contract applying to as little as twelve per cent of the supply, is violative of the antitrust laws. Some cases have held that a system of exclusive contracts by one vendor is unlawful; in other similar cases the contrary has been held, depending upon the total effect of the contracts, shown as a matter of fact. Systems of such contracts by one holding a dominant or monopoly position or by two or more pursuant to conspiracy have almost invariably been held to be unlawful.

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On the evidence in this case the Partmar franchise is neither one of a system, or made by one holding a dominant position, or pursuant to a conspiracy.

In Dueber Watch Co. v. Howard Watch Co., 66 F. 637, 645, CCA 2 1895, exclusive dealing contracts were upheld as not violative of the antitrust laws. The court said:

> "It is a device, probably as old as business itself, to seek to increase the number of one's customers, and the extent of their purchases, by treating more favorably those who become exclusive customers. Certainly there is nothing unlawful or unfair in the statement to the trade by the maker of any kind of merchandise, 'My goods are for sale only to those who will buy from me exclusively, not to others.' "

In Carter-Crume v. Peurrung, 86 F. 439, 442 CCA 6 1898, the Court upheld as permissible under the antitrust laws, a contract to purchase the entire output of a manufacturer. The Court said:

> "If one contracts with a manufacturer for his entire product, it will, of course, restrain the producer from [301] selling to others. But such a contract, taken by itself, is ordinarily harmless. The public are not affected. Another question might arise if all or a large proportion of all the producers of a particular article should agree to sell their entire product to one buyer, who would thereby be enabled to monopolize the market. But, if each inde-

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pendent producer contracts to sell his product, or to sell or lease his plant, without concert with others, or knowledge of or purpose to participate in the plans of the buyer, he cannot be said to have conspired against freedom of commerce, or to have made a contract in illegal restraint of trade."

In United States v. Columbia Steel Co., 334 U.S. 495, 524, 1948, it was held that the fact that a transaction would produce permanent exclusive dealing between United States Steel and the largest independent steel fabricator on the Pacific coast, did not make it unlawful.

"The legality of the acquisition by United States Steel of a market outlet for its rolled steel through the purchase of the manufacturing facilities of Consolidated depends not merely upon the fact of that acquired control but also upon many other factors. Exclusive dealings for rolled steel between Consolidated and United States Steel, brought about by vertical integration or otherwise, are not illegal, at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product." (P. 524.)

In Wilder Company v. Corn Products Refining Co., 236 U.S. 165, a system of exclusive dealing contracts was attacked as violative of the antitrust laws, as a defense to payment for goods purchased. The Court refused to hold the system invalid, and characterized it as "inherently lawful." [302]

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In United States v. Standard Oil Co., 78 F. Supp. 863, the Court said that exclusive dealing contracts were not unlawful per se.

> "As I understand the pleadings, and the Government's position at the beginning of the trial, a judgment is sought decreeing that the clause in the contracts which, by its language and actual effect, as shown by the evidence, restricts the stations not employe-operated to the sale and use of petroleum products and accessories produced or supplied by Standard is illegal per se. We cannot agree. To the contrary, as we read the cases, exclusiveness of outlet is not, in itself, illegal. It becomes illegal only if it result in a substantial lessening of competition or the creation of monopoly in the line of commerce.

In Whitwell v. Continental Tobacco Co., 125 F. 454, 461, CCA 8 1903, it was held that a single exclusive dealing contract, in the absence of monopoly or conspiracy, was not contrary to the Sherman Act.

> "The tobacco company and its employe were not required, like competitors engaged in public or quasi public service, to sell to all applicants who sought to buy, or to sell to all intending purchasers at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons. In the exercise of this right they selected those persons who

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would refrain from handling the goods of their competitors as their customers, by selling their products to them at lower prices than they offered them to others. There was nothing in this selection, or in the means employed to effect it, that was either illegal or immoral."

Contracts with purchasers allowing a rebate upon the price paid if all purchases are made from the seller.

Dennehy v. McNulta,
86 F. 825 May 2, 1898

A system of contracts by the producers of coal within a specified area to sell their entire production to the same exclusive agency is not contrary to the Sherman Act.

Appalachian Coals v. United States,
288 U.S. 344.

In United Shoe Machinery Corp. v. United States, 258 U.S. 451, a system of exclusive dealing contracts, was held to be violative of the Clayton Act. In that case a manufacturer of shoe making machinery leased the machines subject to the condition that all like machinery used by lessees be leased only from it, and that all accessories used in operating the machines be purchased from it. The evidence showed that the lessor controlled more than 95 per cent of the business, occupied a dominant position in the trade, and supplied throughout the country a very large percentage of the machinery,

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and that the effect was to substantially lessen competition throughout the United States.

Other cases sustaining the proposition that systems of exclusive dealing contracts are violative of the antitrust laws only where monopoly, conspiracy or substantial lessening of competition is shown, are:

Standard Oil Co. v. United States,
337 U.S. 293;

Mercoid Corporation v. Minneapolis Co.,
320 U.S. 680;

Mercoid Corporation v. Investment Co.,
320 U.S. 661;

Morton Salt Co. v. Suppiger Co.,
314 U.S. 488;

International Business Machines v. United States, 298 U.S. 131, 140;

Continental Wall Paper Co. v. Voight,
212 U.S. 227;

La Chapelle v. United Shoe Mach. Corp.,
90 F. Supp. 721, 722. [304]

If the franchise is an unlawful exclusive dealing contract, the option to evict the tenant because of inability to enforce the exclusive dealing, is also unenforceable, especially where, as here, the landlord intends to reestablish the exclusive use.

Standard Oil Co. v. United States,
337 U.S. 293;

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Mercoid Corporation v. Minneapolis Co., 320 U.S. 680;

Mercoid Corporation v. Investment Co., 320 U.S. 661;

Morton Salt Co. v. Suppiger Co., 314 U.S. 488;

International Business Mach. v. United States, 298 U.S. 131. [305]

The contention of plaintiff that we have been on both sides of the proposition that the franchise is an exclusive dealing contract and is invalid for that reason, is not correct. We have argued, on the allegations of the complaint that the contract is for exclusive dealing contract and was part of the conspiracy in the government case, that it was an unlawful contract, and for that reason plaintiff should procure no relief. In this regard, the evidence is at variance with the complaint, and no such argument has been made on the facts shown by the evidence.

[Endorsed]: Filed March 2, 1951. [306]

[Title of District Court and Cause.]

MEMORANDUM OF OPINION

Paramount Productions, Inc. is engaged in the production of motion pictures. A subsidiary, Paramount Distributing Company, is engaged in distributing the motion pictures produced by Paramount Productions, Inc. Paramount Pictures

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Theatres Corporation, another subsidiary, plaintiff herein, is engaged in the operation of motion picture theatres. For the purpose of clarity, any and all of the above-named corporations will hereinafter be referred to as Paramount.

The defendant Partmar Corporation was formed by the owners of Fanchon & Marco, Inc. for the purpose of leasing the Paramount Downtown Theatre in Los Angeles, California, from Paramount. The sole assets and business of Partmar Corporation are the holding of said lease and the operation of Paramount Downtown Theatre. All stock of Partmar Corporation is owned by Fanchon & Marco, Inc. For the purpose of this opinion defendants herein will be referred to as Partmar.

In July, 1938, the United States of America commenced an equity action in the United States District Court of New York entitled: "United States vs. Paramount Productions, Inc., et al.," being Equity Number 87-273, which action was brought against eight (8) major companies of the motion picture industry. The Government charged a conspiracy to carry out in the motion picture industry certain trade practices which were claimed to violate the Sherman Act.

In November, 1940, a Consent Decree was entered in the case in which Paramount, Loew's Inc., Twentieth-Century Fox, Warners and R. K. O. consented. Columbia, United Artists and Universal did not consent. The Consent Decree, hereinafter referred to as the First Consent Decree, was to

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operate for a trial period of three years from the date of entry, to wit: November 20, 1940, during which three-year period the [328] Government could not bring any proceedings to obtain any other or further relief. The Government, being dissatisfied with the First Consent Decree, after the lapse of the three-year period moved, in 1944, to modify the Decree in certain respects. Hearings were had on the Government's application for modification, and on January 11, 1946, a written opinion was filed in which all franchise agreements of longer than a one-year period were held invalid. The opinion is reported in 66 F. Supp. 323.

Thereafter, Findings of Fact, Conclusions of Law, and a Decree were entered on December 31, 1946, (reported in 70 F. Supp. 53), which Decree is hereinafter referred to as the 1946 Decree. Appeals were taken from the 1946 Decree, and in June, 1948, the Supreme Court rendered a decision therein, affirming the lower court in part and reversing it in part. The decision is found in 334 U.S. 131. The case was sent back to the District Court of New York for further proceedings on certain issues.

Following rendition of the decision of the Supreme Court, and before any testimony was adduced at the hearings after remand from the Supreme Court to the District Court of New York, a second Consent Decree was rendered. Paramount Pictures, Inc. was a party to the Second Consent Decree which was entered in the District Court on March

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3, 1949. Six defendants did not consent to the Second Consent Decree, and hearings proceeded against the six non-consenting defendants.

Upon completion of the hearings the New York Court entered a decree in favor of the Government and against the six defendants, in terms substantially the same as those of the Second Consent Decree (85 F. Supp. 881). An appeal was taken from the judgment. The Supreme Court refused to set [329] aside the Judgment and Findings of the lower court, and as a consequence the Second Consent Decree and the Judgment against the six defendants not consenting thereto have become final.

On August 31, 1931, Paramount Pictures, Inc., predecessor of plaintiff herein, as Lessor, entered into a lease agreement with Partmar Corporation, as Lessee, by which Partmar was to take over and operate the Paramount Downtown Theatre for a period of years, upon terms as expressly set forth in said lease. At the same time the lease was entered into, a so-called Film Franchise Agreement was executed by and between said parties, running for the same period of time as the lease. Said franchise agreement generally licensed Partmar to exhibit Paramount pictures at the Paramount Downtown Theatre and required Partmar to exhibit feature pictures released by Paramount.

Tho' two documents were executed—one a lease and the other a franchise agreement—it is evident the lease would not have been entered into if the franchise agreement had not also been entered into

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at the same time; and, conversely, the franchise agreement would not have been entered into unless the lease had been entered into at the same time. Although there were two, separate documents—one the lease and the other the franchise agreement—they were executed at the same time, between the same parties, for the same period of time and, as a consequence, must be considered as one agreement.

The lease expressly provided that if the franchise agreement was "for any reason cancelled or terminated," then Paramount might, at its option, cancel and terminate the lease. At the trial herein it was agreed by respective counsel that "any reason" did not mean capricious or arbitrary [330] but that "any reason" meant substantial, and that the franchise agreement could not be terminated except for a legal or substantial reason.

Plaintiff in its brief states:

> "Plaintiff has not contended, as asserted by Mr. Hardy, that termination of the franchise by the capricious or arbitrary act of Paramount would be effective to terminate the lease * * * Plaintiff is not relying upon any arbitrary or capricious termination. It is relying upon a termination by legal means.
>
> "Plaintiff's position * * * is that the phrase 'for any reason whatsoever' means 'any legal cause' or 'reason, something which the Court would accept as a good reason for terminating.' * * *"

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Paramount contends that the Court in United States v. Paramount Pictures, 70 F. Supp. 53, restrained the defendant Paramount "from further performing any existing franchises to which it is a party." However, Paramount knew this was not a final decree; that it was subject to review. But before the expiration of the time to appeal Paramount served notice of termination of the franchise agreement herein.

Paramount contends that it did not appeal from that portion of the decree restraining it from further performing any existing franchise. However, the case of United States v. Paramount Pictures, Inc., 334 U. S. 131, which was the appeal of the 70 F. Supp. 53 case, discloses that Whitney North Seymour argued the case (before the Supreme Court) for Paramount Pictures, Inc., et al. (Appellants' No. 81); with him on the brief were Louis Phillips and Albert C. Bickford. Not only did Paramount know at the time notice of termination was given [331] that the decision in 70 F. Supp. 53 was not a final decision, but it actively participated in an appeal to the Supreme Court from at least a part of that decree.

The Supreme Court, after hearing appeals in the case, including Paramount's, said, at page 156:

> "* * * But we cannot say on this record that franchises are illegal per se * * * Hence we set aside the findings on franchises* * *"

The first question presented to this Court is

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whether a decree, which is subsequently set aside, is a legal cause or reason for termination of the franchise agreement.

The Court of Appeals (9th Circuit) in the case of Keller v. Hall, 111 F. (2d) 129, stated the rule when it held:

> "* * * Moreover, the judgment theretofore rendered in the case, after it was reversed, was 'without any validity, force, or effect.' " ((Page 131)).

The same rule is set forth in a little different manner by the Supreme Court in the case of Arkadelphia Co. v. St. Louis S. W. Ry. Co., 249 U. S. 134, when it said (at page 145):

> "* * * a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby. This right, so well founded in equity, has been recognized in the practice of the courts of common law from an early period. Where plaintiff had judgment and execution and defendant afterwards sued out a writ of error, is was regularly a part of a judgment of reversal that the plaintiff in error 'be restored to all things which he [332] hath lost by occasion of the said judgment'; * * *"

The Supreme Court also said, in the case of B. & O. R. Co. v. United States, 279 US 781, at 786:

> "The right to recover what one has lost by

the enforcement of a judgment subsequently reversed is well established."

The Circuit Court of Appeals of the Second Circuit, in Bondy v. Hardy, 62 F.(2d) 521, stated the rule in another way by saying:

"* * * The effect of the reversal * * * was to put the parties in the same position as if no judgment has been entered."

Consequently, we are of the opinion that the restraining order, subsequently set aside by the United States Supreme Court, was not a legal cause or reason for terminating the franchise agreement.

Plaintiff contends, however, that if it was not justified in terminating the franchise agreement because of the decree, nevertheless it did have a right to terminate the franchise agreement as it was an illegal agreement and was illegal from its inception and thus could be terminated at any time. Hence, we now proceed to the question of the legality of the franchise agreement.

As heretofore mentioned, Paramount gave the following notice to Partmar:

"March 26, 1947.

"Partmar Corporation,
"Paramount Theatre,
"Los Angeles, California.

"Gentlemen: [333]

"You are hereby given notice that the undersigned, one of the parties to the film franchise

agreement, made and entered into on August 30, 1939, as of September 1, 1939, between the undersigned and you, as amended by agreement dated September 1, 1942, made between the same parties, has bee enjoined from further performing said franchise as amended by Decree of the United States District Court for the Southern District of New York, entered December 31, 1946, and modified by order entered February 1, 1947, in the case of United States of America, Plaintiff, against Paramount Pictures, Inc., Paramount Film Distributing Corporation, et al., bearing Index Number Equity 87-273.

"You are therefore hereby notified that the said franchise agreement as amended be and the same hereby is cancelled and terminated, effective as of the close of business on the 31st day of March, 1947.

"Very truly yours,
"PARAMOUNT
PICTURES, INC.,
"By PAUL RAEBOURN,
"Vice President.

"LP:V
"Reg.Mail-Spec.Del."

Although it is the contention of plaintiff that it had a right to terminate the franchise agreement because of its illegality, it will be noted that the only reason given for termination of the franchise agreement was the restraining order made by the United States Court.

On March 30, 1947, Paramount gave notice to the defendants that the lease had been terminated under that [334] clause of the lease which provided that if the franchise agreement was "for any reason" cancelled or terminated, Paramount had the right to terminate the lease. On April 7, 1947, notice to quit was served on Partmar, and when Partmar failed and refused to vacate the theatre building, this action was commenced.

For many years in Los Angeles it was the established practice for each of the major motion picture producers to own and operate its own first-run theatre in downtown Los Angeles for the purpose of the initial run of pictures produced by the respective companies. Paramount Theatre was Paramount's first-run theatre in Los Angeles. The theatre was first built and operated by the producing company for the sole purpose of having an outlet in Los Angeles for its pictures' first runs. When the lease was made and executed between Paramount and Partmar, it was the desire of Paramount and the distinct understanding of all parties that Paramount Theatre would be the theatre in which Paramount pictures would have their first runs in Los Angeles.

The motion picture industry, like Topsy, "just growed," and the lusty, sprawling buiness of today is vastly different from the industry at its inception. In the beginning there were no rules or regulations as guide posts. As problems were presented they were solved by the industry, and over the years

a code of conduct was developed which was accepted and eventually adopted by all of the major studios.

Like other industries, the motion picture industry discovered there were two phases of its business, the main phase being that of producing or actually making pictures; while the other, and perhaps of greater financial importance, was that of selling or distributing the studios' products. [335] All great businesses have learned that production itself is only the beginning and, if a business is to succeed, some adequate scheme of distribution must be developed. All industries have not followed the same pattern of distribution. As a result, various types of businesses have adopted a diversity of ways and means to dispose of their products.

Obviously, it would be impossible for one motion picture producer to print sufficient film to permit distribution simultaneously to all theatres in the nation. Some plan had to be devised by which a few prints could be made and then prorated to exhibitors for use. As all exhibitors could not use the same film at the same time, some arrangement had to be made for first use, second use, third use, et cetera. It is probable that in the early days of the industry producers had difficulty in obtaining exhibitors to show their films, but as time went on and the number of exhibitors increased it became competitive among exhibitors as to which should obtain the first, second or third-run rights of films.

No attempt was made by producers to divide the

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country into zones for distribution. No attempt was made by producers to divide the nation's large cities into zones and allocate to each zone a producer. The producers generally have operated in all parts of the country and in all cities. Although producers made no effort to divide cities into areas, nevertheless each major studio through its distributing agency was as a matter of necessity forced to allocate first, second or third-run rights of its pictures to individual exhibitors. Over the years producers and distributors have founded a course of conduct based on the right to exhibit films first, second or third, within a given community. [336] Certain specified theatres had the right of third run; others had the right of second run, while still others had the right of first run. Producers and distributors also built up a policy of clearance between the end of the first run and the beginning of the second run; the end of the second run and the beginning of the third run.

It is the accepted law of the land that individuals within an industry may not combine for the purpose of controlling competition. Toward the end of the late depression, however, the government attempted to do for various industries that which theoretically they could not do for themselves, and as a result Congress passed the National Recovery Act, commonly known as "N.R.A." Under such legislation industries were allowed to set up codes of fair competition. The motion picture industry in Los Angeles availed itself of the N.R.A. plan and es-

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tablished a code of fair competition which embraced the question of first, second and third runs, clearances between runs; minimum prices, et cetera. Although the Supreme Court of the United States, in Schechter Poultry Corporation, et al., vs. United States, 295 US 495, held such a code invalid, evidence in the case at bar indicates that the code as established for the motion picture industry in Los Angeles under N.R.A. is the basis of the code of fair conduct now in use in the motion picture industry in Southern California.

Paramount, not in conjunction with any other major studio, entered into the franchise agreement which gave to Partmar the right to exhibit the first-run feature pictures of Paramount in the City of Los Angeles.

One of our fundamental legal rights is that of making contracts. Contracts freely made should be upheld. It is not the duty of courts to look for some reason to set [337] aside contracts freely entered into by and between individuals of their own volition; for individuals should have the right to make contracts as they see fit. The courts should seek reasons to sustain existing contracts legally entered into. Hence, as we see it, the duty of this court is to uphold the contract entered into between Paramount and Partmar, unless it was entered into because of misrepresentation, fraud, undue influence, et cetera, or unless the contract is illegal and void because it violates statutory provisions.

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There is no evidence in this case that the contract was executed between the parties through misrepresentation, fraud or undue influence; and if the contract is to be set aside, it must be set aside on the ground that it is an illegal contract.

Plaintiff contends the franchise agreement is illegal and void (in violation of the anti-trust acts) for four reasons:

1. Because of its minimum price provisions.
2. Because of book blockings.
3. Because of runs.
4. Because of clearances.

The questiion of runs and clearances presents a most difficult problem. It is admitted by all the expert witnesses (both plaintiff's and defendant's) who testified in this case that runs and clearances are necessary in the motion picture industry. As heretofore mentioned, it is impossible to allow all theatres to show the same picture at the same time; hence some preference must be given to certain theatres. Runs and clearances have been used for many years, and even those permitted only second or third-run rights are nevertheless of the opinion that runs are necessary and that there [338] should be clearances between runs. In other words, after a theatre finishes a picture there should be a lapse of some days before the same film should be shown in another theatre in the same neighborhood.

However, the question here is not whether runs

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and clearances are necessary but whether the runs and clearances are reasonable. Testimony in this case indicates that within the Los Angeles metropolitan area there had been established the policy of first, second, third and subsequent runs, and there had been established clearances of 7, 14, 21, et cetera, days. Testimony also established the fact that theatres admittedly not in direct competition with downtown Los Angeles theatres were given the same runs and the same clearances as those in the downtown area of Los Angeles. For instance, theatres in San Diego (122 miles from Los Angeles), Santa Ana (35 miles from Los Angeles), Riverside (53 miles from Los Angeles), San Bernardino (60 miles from Los Angeles), Bakersfield (111 miles from Los Angeles), and Santa Barbara (96 miles from Los Angeles) were allowed to exhibit films the same day and date as released in Los Angeles. Motion picture theatres located in such communities were considered to be so far distant as to be not in substantial competition. Consequently, there was no necessity for establishing a different run or allowing a clearance over Los Angeles. Runs and clearances were allowed only as to those theatres in substantial competition with downtown Paramount.

The question arises whether or not the runs and clearances were reasonable as to such theatres in substantial competition. It is difficult to define "substantial competition." What is the yardstick to be used? What bounds the term "substantial competi-

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tion?" Who is to decide what [339] is "substantial competition"—each individual distributing company? Some Board? Or the courts?

Substantial competition is also something which may change from year to year; and substantial competition in Los Angeles, where transportation depends primarily upon the individual automobile, may be entirely different from substantial competition in New York or Chicago. From how far distant does Paramount Downtown Theatre draw its attendance? Does it depend for patronage upon those who drive into downtown Los Angeles by automobile or the commuter who comes into Los Angeles by interurban, or upon those who live in the downtown area? Population, ease of transportation, accessibility, et cetera, may determine to a great exent "substantial competition."

It is agreed that within a limited area Partmar should be protected as to runs and clearances, but where that area ends depends upon many factors. There is no contention that any other theatre within a radius of a few blocks of the Paramount Downtown Theatre should have the right to show the same Paramount films as exhibited by Partmar at the same time. Plaintiff's contention is, however, that the runs and clearances as established by the parties hereto are unreasonable, inasmuch as they extend out beyond the zone of substantial competition.

It has been assumed by the parties hereto that Partmar has an exclusive right to show Paramount

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Pictures first-run in the metropolitan area of Los Angeles. But it should be pointed out that nowhere in the agreement is the word "exclusive" used. It may be that the parties have interpreted the agreement to be an exclusive agreement but, if they have, they have read into the contract something which does not [340] specifically appear there. It is Paramount's contention that Partmar has insisted it has an exclusive, first-run right in the Los Angeles metropolitan area, and it may be that Paramount has acceded to such interpretation of the franchise agreement. The parties may have interpreted the contract to be an exclusive contract when, in fact, it is not.

Where there is a restricted community, whether rural or urban, in which there is more than one theatre, one theatre certanly must be given preference over the others. Neither the theatre owner, producer, nor distributor would want their pictures shown simultaneously in two theatres adjacent to or across the street from each other. The theatre owners themselves wish to have the right to show a picture first within a given community. As a result the distributor must determine which theatre is to have prior right. We do not believe that any motion picture theatre, without a contract to the contrary, is privileged to demand as a matter of right first-run privilege on any particular picture. It seems to the Court that the distributing company should have the right, where competition exists, to determine for itself which theatre shall have prior

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right to its pictures. This determination on the part of the distributor might depend upon several things —location, size of theatre; whether or not it is a new or an old installation, modern conveniences, and management. A motivating force in the motion picture business is income, and the distributor, all other things being equal, will give the right of showing pictures to the theatre likely to produce the greatest revenue.

During the past few years there seems to have developed within the motion picture exhibitors' industry the idea that any theatre had the right to demand prior runs. [341] As a result, when prior runs have not been made available, they have applied to the courts for enforcement of that so-called right.

We are not of the opinion that any theatre has the right, as a matter of law, to demand from a motion picture producer the right of prior runs, any more than the seller of automobiles has the right to demand of the manufacturer an agency within a restricted territory. If the automobile manufacturer has the right to establish an exclusive agency within a restricted area for the sale of its product and to refuse to license any other agency within that restricted area, it would seem to the Court that the motion picture distributor should have the same right and privilege.

In Federal Trade Commission v. Raymond Bros.-Clark Company, 263 US 565, the Circuit Court of

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Appeals held that the Raymond Company had the lawful right to select any particular merchandise which it wished to purchase and to select any person or corporation from whom it might wish to make its purchase and that it also had the unquestioned right to discontinue dealing with any manufacturer. The Commission contended that the conduct of the Raymond Company, acting alone and not in combination with others, constituted an unfair method of competition, but the Court said:

> "It is the right, 'long-recognized,' of a trader engaged in an enitrely private business, 'freely to exercise his own independent discretion as to parties with whom he will deal.' * * *
>
> "A different case would of course be presented if the Raymond Company had combined and agreed with other wholesale dealers [342] that none would trade etc. * * * An act lawful when done by one may become wrongful when done by many acting in concert, taking on the form of a conspiracy * * *"

The Supreme Court sustained the Circuit Court.

In the case at bar there is no proof of conspiracy. Webster's New International Dictionary, Second Edition, defines conspiracy as follows:

> "conspiracy (3). Law. An agreement, manifesting itself in words or deeds, by which two or more persons confederate to do an unlawful act, or to use unlawful means to do an act which is lawful; * * *"

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If the franchise agreement in question had been brought about because of an understanding among production companies or because of an agreement with the exhibitors, we could then understand how it might be said that the contract was an agreement based upon conspiracy; but there is no evidence to indicate that any third party conspired with either Paramount or Partmar to bring into existence the franchise agreement.

If the parties to the franchise agreement had combined to restrain freedom of interstate commerce in the transportation, sale or exhibition of motion pictures, the position of plaintiff that the franchise agreement is void might be tenable, but the evidence in this case does not indicate in any manner that the franchise agreement interfered in any way with the freedom of interstate commerce.

In the absence of conspiracy, a minimum price agreement is lawful in California. The evidence in this case shows at most nothing more than one agreement on admission [343] prices between one film company and one exhibitor, applicable to one theatre. There is nothing to indicate that the admission prices set were the same as those used by other theatres and no evidence to indicate a conspiracy between exhibitors and producers to maintain minimum prices at any number of theatres. At most it was an agreement affecting only one theatre.

If plaintiff had established by competent evidence that the prices as set forth in the franchise agreement were, in general, uniform and used by other

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theatres as the result of a price fixing agreement by the film companies or the exhibitors, there would be some basis for the Court to sustain plaintiff's contention. However, a single contract between one film company and one exhibitor is not violative of the Sherman Act.

In Binderup v. Pathe Exchange, 263 US 291, the Court said, at page 312:

> "It is doubtless true that each of the distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act, * * * The illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the exhibitor."

In discussing resale prices, the Court said in Park, etc. v. Hartman, 153 Fed. 24, at page 37:

> "Each (case—[Elliman & Sons v. Carrington, etc., L. R. 1901, 2 Ch. Div. 275, and Garst v. Harris, 177 Mass. 72; 58 NE 174]) involved only a single transaction by which the [344] article was sold upon an agreement that the purchaser would not resell at less than a named price. Neither concerned any other rights than those of the contracting parties, and neither decides more than that an agreement of sale of a chattel by which the purchaser agrees that he will not sell below a certain price is valid

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and not such a restraint of trade as to be obnoxious to the law."

In United States v. Paramount, 334 US 131, the Court dealt with not a single contract on admission prices but with a system of such contracts to "regiment an entire industry on admission prices."

In Federal Trade Commission v. Curtis Publishing Company, 260 US 568, the Commission contended that Curtis Publishing Company was violating the Clayton Act because it entered into contracts with its distributors in which the distributors agreed to refrain from selling or distributing certain competitor publications and agreed to maintain prices as established by the Curtis Publishing Company.

The Supreme Court held that there was not sufficient evidence to show that the respondent intended to practice unfair methods or unduly to suppress competition or to acquire a monopoly, saying, at page 582:

> "The mere selection of competent, successful and exclusive representatives in the orderly course of development can give no just cause for complaint, and when standing alone, certainly affords no ground for condemnation under the statute." [345]

Again the Court said, in United States v. General Electric Co., et al., 15 F.(2d) 715:

> It must "be conceded that he (the manufacturer) may fix the price at which he will sell, and may select the agents whom he wishes to

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represent him, and may fix the price at which these agents may sell the principal's goods."

In Coca-Cola Bottling Co. v. The Coca-Cola Co., 269 Fed. 796, the defendant contended that a contract entered into by the parties was in restraint of trade and pointed out certain covenants of the contract to substantiate his position.

The Court said, at page 815:

"* * * It is unnecessary to analyze the several covenants pointed out as being in unreasonable restraint of trade. Those covenants at most operate as a partial and not as a general restraint, and are 'merely ancillary to the main purpose of a lawful contract, * * *' "

In regard to block booking, it does not appear to this Court that the franchise agreement as entered into between the parties comes within the meaning of "block booking" as defined by the Supreme Court, which has described the term as "the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor shall also license another feature or group of features released by the distributors during the given period." (U. S. v. Paramount, 334 US 131.)

There is nothing to show that Partmar obtained a license for any particular picture with the understanding that it would also have to license other pictures. The [346] franchise agreement discloses that Partmar was to have Los Angeles first-run rights on all pictures produced by Paramount; and

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there is no evidence to indicate this right depended upon the taking of any particular feature picture. The fact of the matter is that neither Paramount nor Partmar knew from year to year what feature pictures were to be available for exhibition. The evidence discloses that on many occasions Partmar did not show Paramount Pictures for the first time in Los Angeles, as such pictures were shown either under a pre-release agreement, a road show contract, or by other exhibitors.

From the foregoing, we are constrained to hold the franchise agreement is not in itself an illegal agreement; consequently, plaintiff had no right to cancel or terminate it because of illegality.

Inasmuch as plaintiff had no right to terminate or cancel the franchise agreement, it had no right to terminate or cancel the lease and thus failed to establish its right to maintain this action in unlawful detainer.

Plaintiff's claim for damages must also fall because it has not sustained its contention that it was entitled to terminate the lease and demand a return of the theatre.

Defendant filed an answer to plaintiff's complaint, which answer contained three counterclaims:

1. For excessive charges for pictures.
2. For excessive theatre rental.
3. For over-payment of theatre rental.

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Subsequently a further counter-claim was added by amendment, alleging that as a part of the conspiracy Paramount required Partmar to make payment for short-subject motion pictures [347] which Partmar did not need and did not use.

At the time of trial it was agreed that action on the counter-claims should be postponed until after the trial of the main issue involved, and no evidence was offered by either plaintiff or defendant on the counter-claims.

It appears that all of the counter-claims, with the exception of the Third Counter-Claim, are based upon conpiracy. As we find no substantial evidence of a conspiracy in this case on the part of Partmar or Paramount, we are of the opinion that the counter-claimant cannot recover upon the First, Second and Fourth Counter-Claims. Therefore, it will not be necessary to take evidence on such counter-claims.

By its Third Counter-Claim defendant has alleged there was an overpayment of rent made to the plaintiff on behalf of defendant in the sum of $10,666.71.

In its Third Cause of Action plaintiff alleges Paramount made a loan to Partmar in the sum of $28,000.00, evidenced by a promissory note executed by Partmar; that said note has fully matured and there is an unpaid principal balance of said note to April 1, 1947, in the sum of $12,000.00, together with interest thereon at the rate of 2% per annum from September 1, 1946.

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No disposition is now made by the Court of either the Third Cause of Action of plaintiff's complaint or the Third Counter-Claim as set forth by the defendant. Trial on the Third Cause of Action and the Third Counter-Claim will be had at some future date.

Findings in conformity with this memorandum of opinion will be prepared by defendant.

Dated May 2nd, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

[Endorsed]: Filed May 2, 1951. [348]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for a [350] non-jury trial on November 8, 1950, and continued from day to day until December 21, 1950, in the courtroom of the Honorable Harry C. Westover, Judge; plaintiff and third party defendants being represented by O'Melveny & Myers, Jackson W. Chance and Rodney K. Potter; and defendants and third party plaintiffs being represented by MacFarlane, Schaefer & Haun, Henry Schaefer, Jr., William P. Gamble, James H. Arthur and Russell Hardy; whereupon evidence both oral and

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documentary was introduced, the cause was submitted for decision upon written briefs; wherefore, the court being fully advised in the premises, now renders its decision as follows:

Findings of Fact

1. The allegations and each of them contained in Paragraphs 1, 2, 3, and 4 of the first cause of action of the complaint are and each is true.

2. On August 31, 1939, Paramount Pictures, Inc., predecessor of plaintiff herein, as lessor, entered into a lease agreement with Partmar Corporation, as lessee (herein referred to as "Partmar"), by which Partmar agreed to lease and operate the Paramount Theatre at Sixth & Hill Streets, Los Angeles, California, for a period of ten years (Plaintiff's Exhibit 1 being a true and correct copy of said lease agreement).

3. At the same time said lease (Exhibit 1) was entered into, a film franchise agreement was executed by and between Paramount Pictures, Inc., and Partmar, for the same period of time as said lease. Said franchise agreement generally licensed Partmar to exhibit Paramount pictures at the [351] said Paramount Theatre and required Partmar to exhibit feature pictures released by Paramount (Exhibit 3 being a true and correct copy of said franchise agreement).

4. Although two documents were executed, one,

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the said lease and the other, the said franchise agreement, the lease would not have been entered into if the franchise agreement had not also been entered into at the same time. Likewise, the franchise agreement would not have been entered into unless the lease had been entered into at the same time. Though contained in two separate documents the lease and the franchise agreement constituted but one agreement between the parties.

5. Partmar was formed by the owners of Fanchon & Marco, Inc., for the purpose of leasing the Paramount Downtown Theatre in Los Angeles, California, from Paramount Pictures, Inc. The sole asset and business of Partmar are the holding of said lease and the operation of said theatre. All stock of Partmar Corporation is owned by Fanchon & Marco, Inc., which latter corporation executed a guaranty of performance of said lease and said franchise agreement by Partmar.

6. The term of said lease, of said franchise agreement and of said guaranty was extended by amendatory agreements entered into between the parties thereto under date of September 1, 1942, (Exhibit 2 and Exhibit 4) by virtue of which the said term of said lease, said franchise agreement and said guaranty was extended to March 18, 1952.

7. The allegations and each of them contained in [352] Paragraph 8 of the first cause of action of the complaint are true, except that from and after December 31, 1949, all the stock in plaintiff corporation has been and is now owned by United

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Paramount Theatres, Inc., a corporation, pursuant to the second consent decree (dated March 3, 1949, referred to herein).

8. Said lease expressly provided that if the said franchise agreement "be cancelled or terminated for any reason whatsoever," then the lessor might at its option cancel and terminate the lease. This provision did not mean that a capricious or arbitrary termination of the franchise agreement would authorize termination of said lease; it meant rather that if the franchise agreement were terminated for a legal or substantial reason the lease could be terminated.

9. On or about July 20, 1938, United States of America filed suit in the United States District Court for the Southern District of New York against Paramount Pictures, Inc., and others in that certain suit entitled "United States of America, plaintiff v. Paramount Pictures, Inc., et al., defendants," being Equity No. 87273, alleging violations by the defendants, including Paramount Pictures, Inc., and its subsidiary corporations, of Sections 1 and 2 of an Act of Congress of July 20, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restrictions and Monopolies," commonly known as the Sherman Act. Said action was tried and on June 11, 1946, a written opinion was filed in which all franchise agreements, that is license agreements embracing pictures released during a period longer than a year, were held invalid.

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Thereafter findings of fact, conclusions of law and decree were entered on December 31, 1946, (which decree is [353] hereinafter referred to as "the 1946 decree"). In the 1946 decree the trial court enjoined Paramount Pictures, Inc., and all its subsidiaries and affiliates:

> "From further performing any existing franchise to which it is a party and from making any franchises in the future."

The effective date of said decree was April 1, 1947.

10. On March 26, 1947, plaintiff served Partmar with a notice purportedly terminating said franchise agreement as of the close of business on the 31st day of March, 1947, (Exhibit 18 being a true and correct copy of said notice).

11. On April 2, 1947, plaintiff served Partmar with a notice purporting to terminate said lease by reason of the termination of said franchise agreement (Exhibit 19 being a true and correct copy of said notice).

11-a. On April 7, 1947, plaintiff served Partmar with a notice to quit possession of said leased premises (Exhibit 21 being a true and correct copy of said notice to quit).

12. Partmar has at all times refused to vacate and surrender possession of said Paramount Theatre to plaintiff, contending that said franchise agreement is lawful and that said notices are ineffective.

13. Appeals were taken from portions of the

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1946 decree. In June, 1948, the Supreme Court of the United States rendered a decision therein, affirming the lower court in part [354] and reversing it in part. The case was sent back to the District Court of New York for further proceedings on certain issues. The findings of the court below that all franchises were illegal and the order enjoining the performance of such agreements were set aside.

14. Following rendition of the decision of the Supreme Court, and before the testimony was closed and before the rendition of any decision after remand from the Supreme Court to the District Court of New York, a second consent decree to which Paramount Pictures, Inc., was a party, was rendered, dated March 3, 1949. Thereafter another defendant, RKO, was party to a consent decree. Six defendants did not consent to the second consent decree and hearing proceeded against the six non-consenting defendants.

Upon conclusion of the hearings, the New York Court entered a decree in favor of the Government and against the six non-consenting defendants, in terms substantially the same as those of the second consent decree. An appeal was taken from the judgment. The Supreme Court refused to set aside the judgment and findings of the lower court, and as a consequence the judgment against the said six non-consenting defendants has become final. Paramount is enjoined by said second consent decree from further performing any existing franchise to which it is a party and from making any

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franchises in the future, except for the purpose of enabling an independent exhibitor to operate a theatre in competition with a theatre affiliated with a defendant. Defendant Partmar is an independent exhibitor in competition with theatres affiliated with defendants in United States v. Paramount Pictures, Inc., et al.

15. For many years in Los Angeles it was the established [355] practice for each of the major motion picture producers to own and operate its own first-run theatre in downtown Los Angeles for the purpose of the initial run of pictures produced by the respective companies. The Paramount Theatre was Paramount's first-run theatre in Los Angeles. The theatre was first acquired and operated by the producing company for the sole purpose of having an outlet in Los Angeles for its pictures first-run. When the lease was made and executed between Paramount and Partmar it was the desire of Paramount and the distinct understanding of all parties that the Paramount Theatre would be the theatre in which Paramount pictures would have their first-run in Los Angeles.

16. In the beginning of the motion picture business there were no rules or regulations to serve as guide posts for the solution of the distribution problems which arose. Over the years these problems were solved by the industry as they were presented and there evolved a method of distribution which was eventually accepted and adopted by all the motion picture producers.

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It would be economically impossible for one motion picture producer to print sufficient film for distribution simultaneously to all theatres in the nation. Some plan had to be devised by which a few prints could be made and then pro-rated to exhibitors for use. As all exhibitors could not use the same film at the same time, some arrangement had to made for first use, second use, third use, etc.

No attempt was made by the producers to divide the country into zones for distribution. No attempt was made by producers to divide the nation's large cities into zones and to [356] allocate to each zone a producer. The producers generally have operated in all parts of the country and in all cities. Although producers made no effort to divide cities into areas, nevertheless each major producer through its distributing agency was as a matter of necessity forced to allocate first, second or third-run rights of its pictures to individual exhibitors. Over the years producers and distributors have founded a course of conduct based upon the rights to exhibit films first, second or third run within a given community.

Certain specified theatres have had the right of third-run; others have had the right of second-run, while still others have had the right of first-run.

Producers and distributors have also built up a policy of clearance between the end of the first run and the beginning of the second run, the end of the second run and the beginning of the third run.

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17. Runs and clearances are necessary in the motion picture industry. It is impossible to allow all theatres to show the same picture at the same time; and some preference must be given to certain theatres.

18. The run and clearance established for the Downtown Paramount Theater by the franchise agreement was, with minor exceptions, that contained in the NRA schedule of zones and clearances, defendants' Exhibit C. As provided in said schedule a clearance of 7, 14 and 21 days respectively was accorded said Paramount Theatre over subsequent run theatres in the Los Angeles metropolitan area. With minor changes said run and clearance has been maintained under said franchise agreement. Runs and [357] clearances were allowed only as to those theatres in substantial competition with the Downtown Paramount Theatre. The clearances allowed the said Paramount Theatre over other theatres in the Los Angeles metropolitan area were and each was reasonable.

19. Said franchise agreement did not provide for an exclusive first-run for the Downtown Paramount Theatre in the metropolitan area of Los Angeles. Said franchise agreement does provide for a first-run exhibition at said Paramount Theatre. It does not, however, restrict Paramount from granting simultaneous first-runs at other theatres in the Los Angeles metropolitan area or elsewhere.

20. Paramount, not in conjunction with any other major studio, entered into the franchise agree-

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ment which gave to Partmar the right to exhibit the first-run feature pictures of Paramount in the City of Los Angeles. Neither said franchise agreement, nor said lease, nor any amendment to either of them constituted any part of, nor were they or any of them entered into as a result of any agreement, combination or conspiracy of any kind whatsoever between Paramount and any other person or persons, nor between Partmar and any other person or persons.

21. It is neither the purpose nor effect of said lease, or said franchise agreement, or of any amendments to either of them, or of any performance thereunder, to restrain or monopolize trade or commerce among the several states in the production, distribution, transportation, sale or exhibition of motion pictures. [358]

22. The minimum price provision contained in the franchise agreement constitutes no more than an agreement between one exhibitor and one distributor affecting the admission price to be charged at one theatre. Said agreement was not a part of and did not arise out of any conspiracy between exhibitors and producers or either of them to maintain minimum prices at any theatre.

23. Said franchise agreement did not require Partmar to license any given picture or pictures in order to obtain a license upon any other pictures. The franchise agreement discloses that Partmar was to have Los Angeles first-run rights on all pictures produced by Paramount. This right did not

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depend upon the taking of any particular feature picture.

24. The allegations and each of them contained in Paragraphs 2 and 3 of the third cause of action in the complaint are and each is true.

25. The allegations and each of them contained in Paragraphs 2 and 3 of the fourth cause of action in the complaint are and each is true.

26. The allegations and each of them contained in Paragraph 2 of the fifth cause of action in the complaint are and each is true. [359]

Upon the foregoing findings of fact, the court makes the following:

Conclusions of Law

1. The court concludes in all respects as set forth in the foregoing findings of fact. Any conclusion of law set forth in the foregoing findings of fact is hereby incorporated by this reference thereto in these conclusions of law.

2. Said findings of fact having been made upon issues which are determinative of the cause, any further findings or findings upon issues other than those embraced in the foregoing findings would be immaterial and are not made for that reason.

3. The 1946 decree in Equity No. 87273 is so far as it held illegal and restrained the performance of all franchise agreements was subsequently set aside by the United States Supreme Court and was

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not therefore a legal cause or reason for termination of the franchise agreement between Paramount Pictures, Inc., and Partmar.

4. The court should seek reasons to sustain existing contracts legally entered into.

5. For the purpose of clarity of the transaction which is the subject of this action, plaintiff and Paramount Pictures, Inc., should be considered as "Paramount." [360]

6. The franchise agreement between Paramount and Partmar is in all respects legal.

(a) Where there is a restricted community, whether rural or urban, in which there is more than one theatre, one theatre must be given preference over the others. The distributing company has the right where competition exists to determine for itself which theatre shall have prior right to its pictures. In making such determination said distributor must give consideration to such factors as location and size of theatre, age, appointments and management. When such determination has been made the theatres do not have the right, as a matter of law, to demand from a motion picture producer the right of prior runs. The fact that the parties performed said franchise agreement as though it were exclusive did not render it illegal.

(b) The clearance accorded to Partmar by

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Paramount pursuant to said franchise agreement was reasonable and lawful.

(c) The minimum admission price provision of said franchise agreement was in all respects lawful.

(d) The provisions contained in said franchise agreement requiring Partmar to exhibit Paramount pictures 46 weeks out of each year were in all respects lawful.

7. Paramount had no right to cancel or terminate the franchise agreement.

8. Inasmuch as neither Paramount had no right to [361] terminate or cancel the franchise agreement, Paramount had no right to terminate or cancel the lease. Paramount, therefore, has no right to possession of the theatre, or for damages for any alleged withholding thereof.

9. Defendant Fanchon & Marco, Inc., has not incurred any liability pursuant to its guarantee of performance of said lease by Partmar.

10. Paramount is entitled to an adjudication and declaration of the rights of the parties hereto arising out of the execution and performance of the lease and franchise agreement aforesaid and of the purported termination thereof.

11. Inasmuch as the said lease and said franchise agreement and all amendments to each of them were in all respects lawful and were not entered into nor performed as a result of any com-

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bination or conspiracy of any kind whatsoever on the part of either plaintiffs, defendants, third party plaintiff or third party defendants, with any person or persons; inasmuch as said lease, said agreement and amendments thereto have neither the purpose or effect of restraining or monopolizing trade or commerce among the several states in the production, distribution, transportation, sale or exhibition of motion pictures; and inasmuch as each was an agreement solely between plaintiff and defendants, or defendants and third party plaintiffs and third party defendants dealing solely with the Paramount Theatre Los Angeles alone and the exhibition of pictures thereat; third party [362] plaintiffs, and each of them, cannot recover upon the first, second and fourth counterclaim, or any of them.

Dated this 18th day of June, 1951.

/s/ HARRY C. WESTOVER,
Judge.

Receipt of Copy acknowledged.

Lodged June 18, 1951.

[Endorsed]: Filed June 18, 1951. [363]

BLEED THROUGH– POOR COPY

In the United States District Court for the Southern District of California, Central Division
Civil No. 6906 HW

PARAMOUNT PICTURES THEATRES CORPORATION, a Corporation,

Plaintiff,

vs.

PARTMAR CORPORATION, a Corporation, et al.,

Defendants.

PARAMOUNT PICTURES THEATRES CORPORATION, a Corporation,

Plaintiff,

vs.

PARTMAR CORPORATION, a Corporation, et al.,

Defendants and
Third Party Plaintiffs,

vs.

PARAMOUNT PICTURES, INC., et al.,
Third Party Defendants.

JUDGMENT

The decision herein having been duly signed and filed:

I.

It Is Ordered, Adjudged and Decreed that defendants Partmar Corporation and Fanchon & Marco, Inc., have judgment against plaintiff Paramount Pictures Theatres Corporation as follows:

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1. That the said plaintiff take nothing by the first cause of action of its complaint.

2. That the said plaintiff take nothing by the second cause of action of its complaint.

3. That said plaintiff take nothing by the fourth cause of action of said complaint.

II.

It Is Further Ordered, Adjudged and Decreed that the first, second and fourth counterclaims of third party plaintiffs Partmar Corporation and Fanchon & Marco, Inc., be, and the same hereby are, each dismissed with prejudice, and the defendants each take nothing by their said counterclaims.

III.

It Is Further Ordered, Adjudged and Decreed that the rights and duties of the parties be declared as follows:

1. The agreement between Paramount Pictures, Inc., and Partmar Corporation, guaranteed by Fanchon & Marco, Inc., [365] is a valid subsisting agreement in full force and effect. Said agreement provides for the privilege to exhibit first-run at the Downtown Paramount Theatre all Paramount pictures upon their general release. Such first-run privilege is not, however, exclusive and any number of simultaneous first-runs may be licensed to other parties to run concurrently therewith.

2. The lease of the Paramount Theatre between plaintiff and defendant Partmar Corporation, guar-

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anteed by Fanchon & Marco, Inc., is a valid and subsisting agreement in full force and effect, until March 18, 1952, when the said lease by its terms comes to an end.

IV.

Neither party shall recover costs against any other party.

/s/ HARRY C. WESTOVER,
District Judge.

Judgment entered June 19, 1951.

Receipt of Copy acknowledged.

Lodged June 18, 1951.

[Endorsed]: Filed June 18, 1951. [366]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(b)

Notice is hereby given that Partmar Corporation and Fanchon & Marco, Inc., Third Party Plaintiffs above named, hereby [368] appeal to the United States Court of Appeals for the Ninth Circuit from that portion of the final Judgment entered in this action on the 19th day of June, 1951, in Judgment Book 73 at page 126, wherein it is ordered, adjudged and decreed that the first, second and fourth counterclaims of third party plaintiffs Partmar Corporation and Fanchon & Marco, Inc., be, and the same are, each dismissed with prejudice, and

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the defendants take nothing by reason of said counterclaims.

Dated July 16, 1951.

MacFARLANE, SCHAEFER & HAUN,
HENRY SCHAEFER, JR.,
WILLIAM P. GAMBLE,
JAMES H. ARTHUR,
By /s/ WILLIAM GAMBLE,
Attorneys for Defendants and Third Party Plaintiffs.

RUSSELL HARDY,
Of Counsel.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 16, 1951. [369]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 6906-WM—Civil

[Title of Cause.]

Honorable William C. Mathes, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Thursday, June 2, 1949

Appearances:

For the Plaintiff and Third Party Defendants:
O'MELVENY & MYERS, by
JACKSON P. CHANCE, ESQ., and
J. B. CARMAN, ESQ.

For the Defendants and Third Party Plaintiffs:
MacFARLANE, SCHAEFER & HAUN, by
HENRY SCHAEFER, JR., ESQ.,
WM. P. GAMBLE, ESQ., and
RUSSELL HARDY, ESQ.

* * *

By Mr. Chance:

Now, there are four independent grounds that, as a matter of law, we respectfully submit, your Honor may upon this motion rule whether or not this Paramount-Partmar franchise is violative of the Anti-Trust Laws, was properly terminated, that is, the lease was properly terminated by the notices given in March and April of 1947, prior to the com-

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mencement of this action, and therefore that the plaintiff is entitled to the judgment of the court.

The four grounds that we believe your Honor may determine at this time as a matter of law and upon this record go to the essential parts of the franchise and violate the Anti-Trust Laws, if your Honor so determines, are, first, the minimum admission price provision in the franchise agreement; secondly, the fixed clearance provisions of the franchise agreement; thirdly, the so-called block booking feature requiring exclusive exhibition of pictures distributed or released by Paramount over a period of 46 out of 52 weeks of each year; fourth, that this franchise being with a substantial circuit is within the ruling of the Supreme Court.

Then there is a fifth ground that renders the lease itself, as amended, unenforceable in view of the provision of the 1946 decree in the expediting court in U. S. v. Paramount, which [40*] was not disturbed on appeal and which has been, therefore, carried into the formal consent decree entered in March 3, 1949, in that case; that is the provision with regard to the net profit rental provisions of the lease, as amended. [41]

* * *

November 8, 1950

That is the basic thing on this first case, and it will take us until we take a recess before Thanksgiving, and that is the first thing we are going to thrash out, if your Honor will permit. [18]

* * *

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

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I want to say at the same time, in all fairness, Judge Mathes held, as far as the counter-claims are concerned, as counter-claims they state a cause of action and they had to go on trial, and then when he set the case for trial he made an order setting the unlawful detainer action, the plaintiff's right to recover possession of the theatre, down as a separate trial, to be tried out first on the first cause of action of the complaint, the second cause of action of the complaint, and the fifth cause of action of the complaint.

He then ordered that the issue of damages on the plaintiff's unlawful detainer action be deferred and tried after the first trial. Then he ordered that the trial of the counter-claims be a separate trial and come on for trial after and following the trial of these first two matters I have mentioned. [22]

* * *

The Court: Well, I just wanted to get your ideas as to whether or not this was one agreement or two separate independent agreements.

Now, I am rather interested in the statement opposing counsel made to the effect that in opposition to the claim for return of the theatre the defense was raised that the plaintiff could not get back the theatre because the plaintiff was referring to a conspiracy, an unlawful conspiracy.

Was that a contention in the case?

Mr. Hardy: Yes, sir, that is a contention although as defenses those points have been stricken out. Nevertheless it still remains in this case as we shall hope to prove by the facts and establish by the law.

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The Court: You are willing to go this far, that the plaintiff, the Paramount Company, was engaged in a conspiracy, but you are not willing to admit, are you, that Partmar was [25] also a party of that conspiracy?

Mr. Hardy: I am willing to admit they were engaged in the conspiracy but I contend that so far as this tenant was concerned, this tenancy and the serving of that tenant pictures, was not a part of the conspiracy. [26]

* * *

The Court: Are you going to confine your opening statement to the question of the unlawful detainer action?

Mr. Chance: Yes, your Honor. I am glad you asked that question. I have spoken to Mr. Hardy about that at the recess and told him I had outlined my opening statement so that it would cover only this first case that was set by Judge Mathes for the first trial on the unlawful detainer, and I shall not go into the damage issue, nor into the counter-claim issue, which are the second and third trials, but I shall reserve the right to make an opening statement after Mr. Hardy has made his opening statement on the counter-claim at a [36] later time in this trial, when we get down to that issue which, I take it, will be after the Thanksgiving recess.

I take it Mr. Hardy is not in disagreement with that procedure. [37]

* * *

November 9, 1950

Mr. Chance: I agree with that, your Honor, and

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I agree that under Judge Mathes' ruling on the counter-claims where he denied the plaintiff's motion to dismiss those counter-claims, and in effect ruled that the counter-claims had to go to trial, that that is a ruling that we are going to follow here and we are ready at the proper time in the subsequent second trial of this case, the subsequent trial under the order of Judge Mathes, we are prepared to defend those counter-claims with evidence in due course. [86]

* * *

And then, of course, it was on the basis, I believe, of Judge Mathes' ruling in striking out these affirmative defenses, but in holding that the counterclaims nevertheless had to go to trial, that Judge Mathes made his order of April 26, 1948, in setting this case for trial, that separate trials had to be had or would take place, first, on the plaintiff's first, second and fifth causes of action of the complaint for unlawful detainer and declaratory relief and then at the conclusion of that trial to try the issue of damages on the plaintiff's unlawful detainer case and then at the conclusion of that to go forward with the trial on the defendants' alleged counterclaim.

Now, your Honor may want to read, if he hasn't already done so, that order of Judge Mathes dated April 26, 1948, which is in the file, and which set the case for those [87] separate trials.

There is a discussion in the reporter's transcript of the hearing before Judge Mathes on April 26, 1948, ordering the separate trials and I believe that both sides, counsel for both sides, your Honor, have

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prepared their cases in pursuance of Judge Mathes' order of April 26, 1948, so that the evidence will proceed, so far as the plaintiff is concerned, and I believe it has been indicated by counsel for the Fanchon & Marco and Partmar group that they are prepared to proceed accordingly in pursuance of Judge Mathes' order for these separate trials. My opening statement, therefore, related solely to this first separate trial on the unlawful detainer and I reserve the opening statement on the counterclaims to a later time—perhaps next month when we get to that, or earlier if we do so, and I understand that counsel for the defendants are preparing their presentation and their statements accordingly. [88]

* * *

The Supreme Court said that franchises are not illegal per se, clearance is not illegal per se, and one or two other items.

I think, probably, the only thing as to which it did not make that kind of reservation was with regard to admission prices. Even there, it made a reservation, which I think applies to this case as it is being presented by the plaintiff here. The question was raised as to whether one contract containing price-fixing provisions was illegal. The Supreme Court said that is academic. Why? Why was it academic?

Because that case didn't present one contract of that kind. It presented thousands of contracts, a nationwide conspiratorial scheme that had been applied to this great trade of motion pictures. [182]

As I gather from what has been said here, this

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court is being asked to consider this contract to be illegal within its four corners. [183]

* * *

Mr. Chance: I think it might be helpful if I were to sketch our thoughts here. We would like to get right down to brass tacks on it.

The Court: All right. Go ahead. [185]

Mr. Chance: I do think it might be profitable. I will pass over it as rapidly as possible. I would like to call your Honor's attention to my trial brief at pages 26 to 28, trial brief No. 1. Would your Honor look at 26 to 28? You will observe at the bottom of the page we discuss in summary form the detail of the minimum admission prices, referring to the paragraph of the franchise agreement which sets forth the admission prices which Partmar must charge, and the remedies which are accorded to the licensor in the event the licensee fails to comply with the minimum admission prices.

We call to your Honor's attention that counsel for Partmar itself has asserted in this very case the invalidity of this minimum admission prices provision in the film franchise agreement before your Honor, with regard to the minimum admission prices, and that is contained in paragraph 2 of defendant Partmar's concise statement of facts, as claimed by defendants, which is in this trial before your Honor.

In other words, there is a positive position taken, which would seem to eliminate the necessity for much argument, since there is a statement in writing in their statement of facts claimed by Partmar

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and Fanchon & Marco. I call your Honor's attention particularly to that.

The portion of the opinion in U. S. v. Paramount is quoted from on pages 27 and 28 with regard to why they found these minimum admission prices to be invalid. [186]

The Court: I might say I have already read your pretrial memorandum and I will probably read it a good many times during the course of this trial. There is no need, I think, to reread that memorandum.

Mr. Chance: Your Honor, may I point out that in answer to Mr. Hardy's last contention that he made just before he sat down a moment ago, where he said it was not necessary to consider, the court stated they would not consider a minimum admission price in a single license agreement, but that they were only considering the overall picture—might I call your Honor's attention to the quotation from the Supreme Court, lines 21 to 24, on page 27 of my memorandum, where the court said:

> "Nor can the result be different when we come to the vertical conspiracy between each distributor defendant and his licensees."

That is talking about the individual, and I think this Supreme Court passed upon that point precisely.

Your Honor, I call your attention to the fact that Mr. Hardy took the position in oral argument before Judge Mathes that this minimum admission prices in the franchise now before the court was

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enjoined as being illegal, as set out in the reporter's transcript of June 2, 1949.

Now, your Honor, I don't want to go contrary to your wishes in regard to the trial brief, but I would like, if your [187] Honor would permit me, to call attention on the second ground of the inflexible clearance and run provision which is the thing your Honor has to hear the evidence about, which I have outlined in some detail, starting at the bottom of page 28 and over through page 34. I have quoted in that part the various provisions with reference to unreasonable clearance, what the rules are that have to be complied with, and particularly may I call particular attention, your Honor, to the footnote 7 in 334 U. S., which I have quoted on page 32 at the top. [188]

It is at the top of page 32, your Honor, footnote 7, and it is so precise and I am relying upon that very heavily as the evidence will go forward in this case, because it fits this situation like a glove.

The Supreme Court referred to the District Court's finding as follows:

> "Some licenses granted a clearance to sell to all theatres which the exhibitor party to the contract might hereafter own, lease, control, manage or operate against all theatres in the immediate vicinity of the exhibitor's theatres thereafter erected or opened.
>
> "The purpose of this type of clearance agreement was to fix the run and clearance status of any theatre thereafter opened, not on the basis of its appointments, size, location and other

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competitive features normally entering into such determination, but rather upon the sole basis of whether it were operated by the exhibitor party to the agreement."

And the evidence that will come in, your Honor, will show that the '38-'39 clearance given or accorded to the downtown theatres, which is the clearance that this franchise fixes, is inflexible and covers a period of 13 years and an area of 450 square miles and the hundreds of theatres with the 21-day clearance and 7-day clearance and so on. That does not give allowance in any way whatsoever to the new theatres that [189] have since been constructed and we are going to introduce evidence to your Honor of a number of new theatres that have come to us and made demand and have put pressure on us that the clearance accorded in 1938-1939 as to their new theatres was unreasonable and the position that Paramount has been placed in with regard to, particularly those new theatres because they are the ones that create the extreme difficulty of trying to live under what we deem to be an invalid franchise.

So, I would call your Honor's special attention to that footnote 7, but in addition, of course, to the factors that have to be considered by the distributor as to whether the clearance is reasonable or unreasonable; and particularly, your Honor, to the statements in the several opinions that you can't have clearance which is for too long a period of time—in this case 13 years—nor can it cover too great an area—in this case 450 square miles, because if it is

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too long a time or too great an area then it isn't reasonably necessary for the protection of the licensee and it becomes an unreasonable type of clearance and that is the thing that your Honor will no doubt desire to pass upon.

Then the third feature, your Honor, of the detail of this franchise agreement, which we think is important, if not more important than any other feature in determining whether it is valid or invalid, and whether or not the [190] invalidity goes to the essence and is non-severable from the balance, is this provision which requires exclusive exhibition by Partmar of Paramount feature pictures for at least 46 weeks out of every 52 weeks of every year of this 13-year term. And in that regard, your Honor, we get into the conditioning—that you can't condition the license of one film upon the taking of licenses for two or more films.

Of course the important part here is—that is on page 43, your Honor. Will your Honor make note of this. On page 43, the bottom of page 42 and all of pages 43, 44, 45 and 46. There we set out the record in which counsel for Partmar have contended in writing before the New York District Court in 87273, that that 46-week exclusive dealing provision is illegal. That was asserted in the briefs filed in the Supreme Court, which we shall introduce into the record in due course. So, taking the defendant Partmar's own statement and own position with reference to this conditioning or anti-block booking or exclusive dealing, whichever you want to term it, they have asserted of record that that is illegal and

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they are borne out in that respect by the portion of the Supreme Court decision which I have set out at the bottom of page 33.1 and the top of page 34.

So, I would like your Honor particularly to have in mind the position which the defendant Partmar Corporation, or its chief counsel, has taken of record on this very provision of [191] this film franchise agreement now before your Honor.

Then the fourth point that is involved for your Honor's consideration, we have briefed at the bottom of page 34 through the top of 37.1, which is at the bottom of page 34, your Honor, which is the question as to whether a franchise to Partmar, a part of the Fanchon & Marco circuit which has this affiliation with Paramount in the Hollywood Theatre by 50-50 ownership of the corporation which owns the leasehold on that theatre, is an independent within the provision allowing a franchise under limited conditions to an independent to compete with defendants or their affiliates; or whether on the other hand that takes them out of that category, being an independent, and we have set out our views in writing on that fourth point which I would like your Honor to very particularly have in mind. [192]

* * *

November 14, 1950

The Supreme Court has said in this very case, in the Paramount case, that franchises are not unlawful per se and has sent them back to the District Court to get more evidence—to get more facts than were shown in that very voluminous record, to show that they are in restraint of trade if it can be shown.

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In this branch of the law this kind of a contract as it is described in the other opening, I think should be classified as what is known as an "exclusive dealing contract"—that is, a contract either where a seller requires the buyer to deal exclusively with him or conversely where the purchaser requires the seller to deal exclusively with him.

In one case with regard to the buyer it is aimed at his competitors.

If this is an exclusive dealing contract, having an unlawful effect, then it was one designed to and which has actually prevented the use of competitive films in this theatre. Now we will show that it had not any such effect at all. We will show that that is not by any means the meaning of its terms.

It is only when exclusive dealing contracts are a system of such contracts that they have been held to be illegal as in restraint of trade. [265]

By "a system of contracts" I mean contracts more or less on a nationwide scale. Recently there was a typical instance of that kind in this court in the Standard Oil case, in which the Standard Oil Company made contracts with retail dealers requiring them to purchase their goods exclusively from the Standard Oil Company.

In that case there were literally thousands of those contracts over a great trade area.

The contention seems to have been made in that case by the Government that that system, all of those contracts, was violative of the anti-trust laws per se.

This court stated that was not a correct statement of the law. In 76 Fed. Supp. page 863, this court said:

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"As I understand the pleadings and the Government's position at the beginning of the trial, a judgment is sought decreeing that the clause in the contracts which by its language and actual effect at shown by the evidence, restricts the stations to the sale and use of petroleum products and accessories produced or supplied by Standard is illegal per se.

"We cannot agree. To the contrary as we read the cases, exclusiveness of outlet is not in itself illegal. It becomes illegal only if it results in a substantial lessening of competition or the creation of monopoly in the line of [266] commerce."

Now, that is what must be shown here with regard to this contract before this court should declare it illegal.

This contract has already been subjected to that test in the Paramount case in New York in an environment of monopoly and restraint of trade and yet the Supreme Court picked contracts of this kind, as they are described by the other side, picked them out of that environment and said:

"These are not illegal per se,"

and it said in effect:

"These are not illegal even in that environment. You must show something else."

In another case that came up from this district the Supreme Court made the same holding with regard or to the effect that an exclusive dealing con-

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tract, a single exclusive dealing contract is not unlawful per se, and that was an exclusive dealing contract applying to transactions of purchase and sale running literally in the millions. That was the case of the United States versus Columbia Steel Company, reported in 334 U. S. at page 495.

In that case the steel company acquired the Consolidated Steel Company. The Supreme Court recognized that that brought about an exclusive dealing contract between United States Steel and its acquired subsidiary.

The Government contended that that acquisition which produced that exclusive dealing situation rendered the [267] transaction unlawful; but the Supreme Court said:

> "Exclusive dealings for rolled steel between Consolidated and United States Steel brought about by vertical integration or otherwise are not illegal, at any rate until the effects of such control is to unreasonably restrict the opportunities of competitors to market their product."

That, of course, is one of the effects that must be shown here in order to condemn this contract standing alone. [268]

* * *

The question that Mr. Hardy urges comes up under his counterclaims, under the trial that will come up subsequently where he claims that the provisions of this franchise agreement were unreasonable and excessive and there your Honor will have to determine whether or not that is true and

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whether or not they are entitled to any relief. But I don't think we ought to lose sight of the issue that is before the court at this time on this first [343] trial.

* * *

I think when you come to the counterclaim stage of this trial Mr. Hardy will offer a letter which he may claim was a request on the part of his client to reduce the prices in 1939 below this schedule that is set up on page 22 of Exhibit 3, but insofar as the prices that were raised for this downtown theatre above this minimum schedule during certain of the years, particularly the war years, I think that the evidence will simply be that Mr. Wolff and Mr. Harry Arthur, the [355] operators of the theatre, on their own behalf and without consultation with Paramount raised the price to what they actually charged. I believe that will be the evidence. [356]

* * *

We offer that for the limited purpose only of showing Paramount as being subject to the injunctive features of the decree entered pursuant to that opinion relating to the franchise provision and relative to minimum admission prices, unreasonable clearances, and conditioning of one film license upon the taking of other film licenses from the same distributor, or block booking.

We do not refer to the opinion for any other purpose. In other words, we refer to it for that limited purpose. [371]

* * *

Mr. Chance: I call to your Honor's attention and

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make reference to, but I do not offer into evidence, the decree of the United States District Court in Equity No. 82,273, entitled United States versus Paramount Pictures, et al., which is reported in 70 Fed. Supp., page 72, and following.

I hand to your Honor for ready convenience but without offering into evidence, a printed copy of the decree which is verbatim of that reported in 70 Fed. Supp., 72 and following, and which has now been marked under the court's order Exhibit 7 for identification.

I do not offer that into evidence. I call the court's attention and make this reference to said decree for the limited purpose of the court considering those portions of that decree pertinent to this case of the unlawful detainer case and the question of the validity or invalidity of the franchise which deals with (a) franchises generally; (b) with minimum admission price provisions; (c) with unreasonable [376] clearance; and (d) with conditions requiring the taking of another or other film licenses or so-called block booking. [377]

* * *

November 15, 1950—10:00 A.M.

The Court: You may proceed.

The Clerk: Paramount Pictures Theatres Corporation versus Partmar Corporation, a corporation, et al.

Mr. Chance: We are ready.

May it please the court, on thinking the matter over last evening I came to the conclusion that I may have wasted a little of your Honor's time late yes-

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terday afternoon in not offering into evidence rather than merely having it marked for identification, the formal decree of December 31, 1946, which is marked as Plaintiff's Exhibit 7 for identification.

So this morning I shall hereby and do offer into evidence for the limited purposes only which I stated in connection with the calling of the decree to your Honor's attention, or making reference to it yesterday afternoon and for those limited purposes only I offer Exhibit 7 for identification into evidence.

The Court: It may be received and so marked.

(The document referred to was marked Plaintiff's Exhibit 7 and received in evidence.)

The Court: Do you want to object now?

Mr. Hardy: I object to the limitation. I think the document should go in as a document in toto—no part of [384] it but the whole thing.

The Court: Well, your objection is overruled. It is before the court and the court would read the decision in any event without it being introduced into evidence.

It is a decision of the court which is binding upon this court. I don't see very much difference whether it is in evidence or not. The objection is [385] overruled.

* * *

Mr. Hardy: If your Honor please, may I add something in that connection? Section 5 of the Clayton Act provides that in a private suit under

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the anti-trust laws relative to the same matters involved in a suit by the government against the same parties, the judgment in a contested case shall be taken by the court as prima facie evidence.

It was because of that section of the statute that I was very interested as to precisely the function and effect of this judgment which is being offered, and I think it is precisely because of that statute that counsel is taking such a fine sight on that judgment and offering it in part and rejecting [389] it in part, and offering it in such a tentative and uncertain fashion. It is because of that statute that I objected to accepting it piecemeal.

Of course, I would love to have that document in this case strictly as a piece of evidence, because I think it would help us tremendously.

The Court: Well, when it comes your turn, if you want to introduce it or make a motion that it be received in toto, you can. [390]

* * *

Now we next offer into evidence a certified copy of the consent decree as to the Paramount defendants, filed March 4, 1949, in the Southern District of New York, in Equity No. 82,273, in the case entitled United States of America versus Paramount Pictures, Inc., et al., defendants, which is a printed copy and certified copy of that decree. We offer this evidence for the same limited purposes which I stated in regard to Exhibit No. 7.

I might state that this has been marked as Exhibit 1 under date of March 15, 1949, on the motions for summary judgment and I would suggest

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that, to keep the record clear, the court direct the clerk to take off that exhibit number [407] and give it the next exhibit number in order in evidence.

The Court: It may be marked Plaintiff's Exhibit 10 in evidence.

(The document referred to was marked Plaintiff's Exhibit 10 and received in [408] evidence.)

* * *

December 5, 1950

GEORGE A. SMITH

having been previously duly sworn, resumed the stand and testified further as follows:

* * *

Cross-Examination

By Mr. Hardy:

Q. Have you some plans about selling your pictures to a new tenant of that theatre if this one shall be evicted?

Mr. Chance: Object to that as being immaterial.

The Court: Sustained. I know, Mr. Hardy, you made a statement in one of your opening speeches to the effect that Paramount wanted to get out Partmar so they could give the theatre to some other organization, but I don't know whether that is material in this case. Why is it?

The question is whether or not they have a right to terminate the lease. If they have a right to ter-

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(Testimony of George A. Smith.)

minate the lease, then they have a right to give the theatre to anyone they want, don't they?

Mr. Hardy: Well, if your Honor please, on the theory on which this case is evidently being tried, it is an anti-trust case. I am prepared to submit authorities to your Honor to show the scope of such an inquiry cannot be confined to the four corners of this contract, and I am prepared to show, and I think we shall succeed before this is over, that this lawsuit, this attempt to evict this tenant, is an act in pursuance of a conspiracy to monopolize and restrain the motion picture business in this city despite the decree of the New York court.

These two companies, this film company and this theatre company, have been required by a judgment to divorce themselves completely, to be strangers commercially. Honestly and [875] sincerely and, as a matter of fact, we have that landlord, who is supposed to be separated from that company, bringing this gentleman to this courtroom to assist them to evict us.

Now, legitimately, his company can have no interest in evicting this tenant, but here we have them doing it.

The Court: Mr. Hardy, this is an unlawful detainer action and I don't believe that the plaintiff in this case in order to sustain the right to terminate the lease can be permitted to rely on something that happened after the notice of termination. In other words, he gives notice of termination and then comes in and says a year after something hap-

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(Testimony of George A. Smith.)

pened that will give us authority to terminate the lease, and I don't think that is possible.

Now you are going to be restricted to the things that occurred prior to and up to the date of the termination, and I don't see how you are going to be able to bring in anything that happened afterwards to bolster up or help your case.

If that is true, as far as the plaintiff is concerned, on anything that happened subsequent to the notice, I don't think it is material.

You say some time in the future, not now, but some time in the future they are planning to give this theatre to somebody else. I don't know.

It seems to me that if the plaintiff cannot rely upon anything that happened after the notice of termination, that [876] the defendant can't rely on anything that happened after the notice of termination or anything that is going to happen.

The question before this court, as far as the franchise agreement is concerned, is whether or not that agreement tends to monopolize the motion picture business here in Los Angeles. That is restricted, I think, to the time of the notice of termination of the contract, the termination of the lease, and not what is going to happen in the future.

Mr. Hardy: Well, your Honor's statement pleases me very much, but you haven't made a ruling that has cut this case down to that size.

The Court: I am getting ready to make one now. [877]

* * *

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(Testimony of George A. Smith.)

Mr. Hardy: I am trying to establish that it is valid. I am trying to establish that none of the restraints and monopoly conditions that have existed here can be traced to this contract, to the terms of this contract. That all of the restraints and monopoly conditions that exist here exist because of the conspiratorial arrangement between Paramount and Fox West Coast principally. [1077]

* * *

The Court: It seems to me, Mr. Hardy, that if there is a monopoly here Partmar has the monopoly. Partmar has the privileged position here in this community. They are the ones who have the theatres and they are the ones who show the pictures first. Not only that, but according to the theories advanced here, they are precluding the other theatres from showing those pictures until Partmar can show them first. So Partmar has the monopoly. [1083]

* * *

December 7, 1950

GEORGE A. SMITH

Cross-Examination
(Resumed)

* * *

The Court: In establishing these clearances for Paramount, at any time did you work in conjunction with any other major studios, such as Warner Bros., 20th Century-Fox?

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(Testimony of George A. Smith.)

The Witness: You mean distributors, your Honor?

The Court: Distributors.

The Witness: No, sir, we haven't.

The Court: In other words, your clearance was a clearance only for Paramount?

The Witness: That's right, sir.

The Court: And you disregarded any clearance for any other distributors?

The Witness: Completely in making any decision, yes, sir. We act on our own responsibility.

The Court: May I ask, Mr. Hardy, is there going to be any evidence to show that Paramount in conjunction with any other distributor, say Fox-20th Century or Warner Bros., got together and conspired to make these different clearances among the different localities?

Mr. Hardy: I think there will be some evidence to that effect.

The Court: There will be?

Mr. Hardy: Yes, sir.

The Court: All right. [1188]

Mr. Hardy: I say I think so. I am not sure. I think we may introduce that.

The Court: Mr. Smith said that there wasn't, so I was just wondering if there was going to be any evidence to the contrary.

Mr. Hardy: There is already evidence in this case to that effect. I understand they put the findings of fact in the government's case in here and the findings of fact find that that was done.

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(Testimony of George A. Smith.)

Mr. Chance: We have not put any findings of fact in.

Mr. Hardy: You have not?

Mr. Chance: No, sir. They are not admissible.

Mr. Hardy: The findings of fact in that case were to that effect.

The Court: There is nothing in this case so far, as far as I know, to show Paramount got together with any other distributor and attempted to divide up the territory or attempted to divide up the theatres, or attempted to divide up the clearances. In other words, if Paramount went down to Loyola Theatre, they did not go into the Loyola Theatre together with Warner Bros. or with RKO and say, "Now, we will take Loyola and you can have some other theatre, and we will give all these theatres a 21-day clearance." [1189]

* * *

December 12, 1950

The Court: So far as this case, there hasn't been one iota of evidence to indicate there was any conspiracy with Paramount, Fox, Warner Brothers, or any other producer or distributor.

The only thing you have got in this case so far is the decision in the Supreme Court case in which it says, "In the country as a whole there is a conspiracy." They didn't say in Los Angeles there is a conspiracy. It might be inferred, because Fox, Warner Brothers, Paramount, and the other producers operated in Los Angeles, there is a conspir-

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acy, but so far there hasn't been anything to show that any agreement that was made by Paramount was made in conjunction with a similar agreement made by Warner Brothers or even with Warner Brothers' or Fox's knowledge that the agreement was being made. [1424]

* * *

Mr. Hardy: No, no; that is what they say and we may assume, at least for the moment, that it was true, that it was because of the physical characteristics of that theatre and not because of the contract. But even at that we come back to our contention even if it was an exclusive first run it was merely permissible.

There are many cases under the anti-trust laws dealing with exclusive dealing contracts. I think your Honor will find that they all have certain elements in them. One of the elements, one of the indispensable elements will be this, that the seller who sells his goods or leases his wares on contracts requiring the lessee or the buyer to deal with him exclusively, has a very dominant position in his industry— [1579] that he represents 50 or more per cent of the supply. And the next element is that he has a system of such contracts—that is to say he is selling to a great number of buyers who represent a very substantial part of the market and he has the same contracts with all of them.

Now, the courts have said, and this court perhaps in the most recent case which has gone to the Supreme Court, the Standard Oil case, which dealt with its contracts with gasoline stations, said that

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there must be something in addition tothat—in addition to the dominant position of the vendor, in addition to the system, widespread system of such contracts. There must be shown a factual result from that and that must be a substantial restraint of trade, a substantial effect upon the market.

If you undertake to apply those exclusive dealing cases, which I think control here, you will see at once a vast distinction between the facts in those cases and the facts here.

You have here one contract. Let us call it an exclusive dealing contract—exclusive right up to the hilt. You have one contract.

Now, it happens that there is a precedent with regard to this contract and similar contracts. To me it is not merely a persuasive precedent but it is a decision of the New York court and a decision of the Supreme Court right on the head of this franchise. It is right on the nose. And [1580] it says that these franchises on this record are not illegal. If you find these contracts illegal you must find something more than is shown in this case.

I think two of the reasons why the Supreme Court said that was because—take Paramount for instance. Paramount alone with regard to the supply of pictures, which it produces, is not a dominant factor in this industry. Paramount alone cannot control or seriously affect the supply of pictures unless it operates or associates itself in that regard with other film companies. But take Paramount alone. I don't know what percentage it represents, but I think it is well below 20 per cent. It

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does not have the dominating position that we find in the other exclusive dealing contract cases.

Secondly, it does not have the system of such contracts. I think in the case that went to the Supreme Court there were four so-called franchises that Paramount had. Only four. And this was one of them and I think the Hollywood franchise was another. So that you see the Supreme Court was really talking about these particular franchises—had really decided that in conjunction with that the Supreme Court laid down a rule about franchises and it said franchises "are not unlawful per [1581] se."

* * *

December 14, 1950

HARRY C. ARTHUR, JR.

the witness on the stand at the time of recess, having been first duly sworn, was examined and testified further as follows:

Cross-Examination

By Mr. Chance:

* * *

Q. And would you say that one of the things that has brought you to the conclusion that a recasting of clearances in this whole area would be in order as against what the clearances were some 10 years ago, the fact that we have had this tremendous growth of population in these various areas, in-

(Testimony of Harry C. Arthur, Jr.)

cluding the area down around Inglewood and the area around Baldwin Hills and so on?

A. No. I would say that the reason for the recasting of the clearances is because they have given all the advantages to Fox West Coast and there should be an equality in the entire area between all theatres. [1791]

* * *

Q. For how long a period has that continued of Cabart having half of Warner's, half of Universal, and the Columbia and Republic you mentioned?

A. Quite some time.

Q. Over the last 10 years, say, Mr. Arthur?

A. Maybe not that long.

Q. Approximately?

A. Yes, it could be.

Q. It could be?

A. Certainly it was over seven.

Q. Somewhere between seven and 10 years that has continued? A. Yes, I think so.

Q. When, if at all, was the first time that any one of these Cabart theatres in Long Beach first-run houses commenced to show Warner feature pictures on a day and date basis with the Warner's Downtown, Hollywood and Wiltern?

Mr. Hardy: I object to that.

The Court: On what ground?

Mr. Hardy: It is irrelevant.

The Court: Overruled. [1903]

* * *

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December 19, 1950

The Court: Well, Mr. Hardy, if you are successful in proving—I think you have tried not to prove—but if you are successful in proving that this franchise agreement was an unreasonable restraint-of-trade agreement, then I am going to probably have to find that the Paramount people were justified in terminating the franchise agreement and the lease. You have attempted, and you have argued all along, to show that the franchise agreement and the actions of the parties under the franchise agreement were not an unreasonable restraint of trade. That has been your whole philosophy. Otherwise, you and Mr. Chance could get together and stipulate here you had a document that had been unreasonable and the document could be terminated, and then we could come to the question of the rights of the parties as to damages. But if you are successful in establishing, or if Mr. Chance is successful [2133] in establishing that we have a condition here that was an unreasonable restraint of trade, then I think I am going to have to find, as a matter of law, that Paramount was entitled to terminate its lease. [2134]

* * *

December 20, 1950

So far, in this case, there hasn't been any evidence of any kind that there has been a conspiratorial relationship between Paramount and any other of the distributors or the exhibitors. This is the first time that there has been any offer to show any connection at all between Paramount and an

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exhibitor, that is, the refusal to open up first runs on the ground that there was an arrangement with Fox West Coast.

If there is a conspiracy, as I said, if the parties have gotten together, all the producers and all the exhibitors have got together and fixed prices, divided up the prices, determined who should have first run, the second run, and so forth, that would be an entirely different situation than we have here at bar [2260]

* * *

June 18, 1951

Mr. Gamble: The objection that we have, your Honor, primarily, is this case as decided by the court was an unlawful detainer case, and in the determination of the case all that was necessary was to find that they had no reasonable grounds for terminating the lease. And, actually, these other facts as to the block booking, the price fixing, and so forth, if the court found that that contract was a valid contract in itself, then they had no justifiable reason for terminating the lease. That is actually all the case boils down to. The rest of it is opinion of the court which was [4*] well expressed and which was probably necessary.

The Court: What are you going to do about your counter-claims?

Mr. Gamble: That is the only thing that we are really worried about, and that is this: In the opinion it is set forth just exactly what happened, that it was stipulated that those matters would not be

* Page numbering appearing at top of page of original Reporter's Transcript.

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tried and there would be no evidence as to the conspiracy.

The Court: That is true, but all your counterclaim is based upon a question of conspiracy, and if you can't establish conspiracy, I don't know how you can recover.

Mr. Gamble: The burden was never on the defendant to establish the conspiracy in this trial. The plaintiff never introduced any evidence of conspiracy. They introduced evidence of the illegality of the contract itself. In an anti-trust case it isn't even necessary to have a contract, and consequently there can be other evidence outside of the contract which would show the conspiracy.

Now, the plaintiffs never introduced any, and by the stipulation of the court, or by the stipulation of the parties and the ruling of the court, it was not our burden to establish our counter-claim at that time and introduce evidence.

The Court: Mr. Hardy definitely argued with me that at most—these are his words—that at most this was a [5] contract between one producer, one theatre. He emphasized the "one" time after time. He emphasized that no other parties were interested, and it is just one contract between one producer or one distributor and one exhibitor.

Mr. Gamble: That is true, your Honor, and, as far as that contract is concerned, it could be between one producer and one exhibitor. But that doesn't mean that outside of that contract that there were other producers and other exhibitors that were entering into conspiracy to make thas contract be-

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tween the one exhibitor and the one producer. Now, it is true——

The Court: You had an opportunity, and I thought you went into the matter very thoroughly, to try to show what the effect of this so-called franchise agreement was upon other exhibitors. You weren't limited as to time. You spent lots of time up here trying to establish the facts.

Mr. Gamble: That is true, but we didn't try to establish conspiracy, because conspiracy wasn't part of our cases. Ours was a defensse of an unlawful detainer suit. It was not the conspiracy, because our conspiracy, to allow recovery on the counter-claims, was something outside of the unlawful detainer suit, and consequently there was no burden upon us to show it. And the plaintiffs did not assume any burden to show illegality of this contract by reason of any conspiracy.

The Court: If you had just come in and defended upon [6] the unlawful detainer suit and made that the only issue, yes. But you didn't. You enlarged the issue. You not only said, "Why, this is an unlawful detainer action and the plaintiff is not entitled to his theatre back," but you went on to say, "That there was a conspiracy, and as a consesquence we are entitled to damages."

Mr. Gamble: In our counter-claim, yes. And there was no hearing; the trials were separated. The first was the trial of the unlawful detainer. And, as your Honor sets forth in the opinion, "At the time of trial it was agreed that action on the counter-claims should be postponed until after the

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trial of the main issue involved, * * *" That was the unlawful detainer.

The Court: But I go back to your own pleadings and say, "becauses there was a conspiracy." And we have found there was no conspiracy.

Mr. Gamble: Was it necessary for us to introduce evidence of the conspiracy when there was another perfectly good defense which your Honor found? And, consequently, the burden of proof was not on us, as it would be on our counter-claims, to prove the conspiracy.

The Court: I don't think we can try these cases piecemeal. We have got to have the evidence.

As far as I know, all the evidence was in relative to the conspiracy. [7]

Mr. Gamble: Not on the counter-claim. They were specifically designated to be tried piecemeal.

Your Honor, this is the situation: Plaintiff on its case proved, first, notices and their being enjoined by the order of the New York court, and your Honor found that they were not enjoined, and that the other matters which they raised as to the illegality of the contract were not valid. The court specifically found that. Now, no point was raised by the plaintiffs that there was a conspiracy which invalidated this contract.

Here we had a contract, for instance, to make it a pure example, between the clerk and me, but your Honor and Mr. Chance and Mr. Potter are conspiring to make Mr. Clerk and me enter into a contract. Now, it was determined or is determined by the judgment of this court that the contract

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between Mr. Clerk and me was a perfectly valid contract between ourselves. Now, under the Sherman Anti-trust, if there is a conspiracy outside of that contract, that contract may be part of an illegal conspiracy which may entitle either one of us to damages.

Now, there was no issue of that conspiracy outside of the contract raised by the plaintiffs in this case. They said the terms of the contract themselves show a violation of the Sherman Act. And the court disagreed with them on that.

Now, the burden would be on us on the trial of our [8] counter-claims to show that despite the apparent legality of that contract that there was a conspiracy outside of the contract which by reason of the conspiracy entitled us to damages.

In other words, we were forced into a position in signing this contract between the two of us which was an onerous and burdensome contract, and the conspiracy outside resulted in this contract.

The Court: I don't agree with you. I just disagree with you.

* * *

[Endorsed]: Filed July 30, 1951. [9]

PLAINTIFFS' EXHIBIT No. 1

This Indenture of Lease (sometimes hereinafter referred to as "Lease"), made and entered into as of the 1st day of January, 1939 (but actually executed and delivered on the 30th day of August,

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Plaintiffs' Exhibit No. 1—(Continued)

1939), by and between Paramount Pictures, Inc., a corporation organized and existing under the laws of the State of New York and duly qualified to do business in the State of California, party of the first part, hereinafter called "Lessor," and Partmar Corporation, a corporation organized and existing under the laws of the State of California, party of the second part, hereinafter called "Lessee,"

Witnesseth:

That Lessor, in consideration of the rents herein reserved and of the terms, covenants, conditions and agreements herein contained on the part of Lessee to be kept, performed and fulfilled, has demised and leased to Lessee, and Lessee has hired and taken from Lessor, the theatre portion of the building now known as the Paramount Theatre Building, located on the Northeast corner of Sixth and Hill Streets, in the City of Los Angeles, County of Los Angeles, State of California, the land upon which said building is erected being more particularly described as follows:—

> Lots Six (6) and Seven (7) in Block Fourteen (14) or Ord's Survey, as per Map thereof recorded in Book 53 at pages 66 et seq., Miscellaneous Records of said County of Los Angeles, excepting therefrom that portion of said Lots, being approximately the Easterly ten (10) feet thereof, that has been taken for alley purposes;

together with all exits, entrances and appurtenant

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Plaintiffs' Exhibit No. 1—(Continued)

passageways and courtways and all easements for light or air in connection therewith.

To Have And To Hold said premises, with all rights, privileges, easements and appurtenances thereunto belonging or in anywise appertaining, together with the furnishings, fixtures, personal property and equipment now therein contained, unto Lessee, for a term commencing as of the 1st day of January, 1939, and ending on the 31st day of August, 1949, unless said term shall be sooner terminated as hereinafter set forth.

Article I.

Furnishings and Equipment

Lessee shall have the right, from time to time, to cause to be installed in the demised premises, at its sole cost and expense, such furnishings and equipment as it may see fit and the further right to remove, change or exchange same, provided it be not in default under this lease and the installation be without cost or expense to Lessor.

All such furnishings and equipment so installed by Lessee, and any and all replacements and substitutions therefor, shall be and remain personal property and the property of Lessee or Lessee's licensees, as the case may be, notwithstanding any part or portion thereof be or become incorporated in the building of which the demised premises are a part. Lessee shall not remove or replace any article belonging to Lessor, now installed in said premises, without having first obtained Lessor's

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Plaintiffs' Exhibit No. 1—(Continued)

written consent thereto, and if Lessor shall consent to any such removal or replacements title to the substituted articles and any and all subsequent replacements thereof shall vest and remain at all times in Lessor, it being further agreed that any article substituted by Lessee shall have a value, at the time of substitution, at least equal to that of the article removed and replaced.

Article II.

Rent

As rental hereunder Lessee shall pay to Lessor the following sums in the manner following:—

(a) For and during the eight (8) calendar months from January 1, 1939, to August 31, 1939, a fixed weekly rent of Two Thousand Two Hundred Dollars ($2,200.), for each lease week, payable in advance, on the first day of each and every such week, commencing on the date of the actual execution and delivery hereof, and a pro rata of Two Thousand Two Hundred Dollars ($2,200.), as the fixed rent for any number of days less than a full week, payable in advance, on the first of said days, (it being understood that the amounts heretofore paid for the period from January 1, 1939, up to the date of the actual execution and delivery hereof as and for rent of the demised premises for such period pursuant to the Indenture of Sublease dated as of October 17, 1935, between Paramount Properties Incorporated, as lessor, and Partmar Cor-

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Plaintiffs' Exhibit No. 1—(Continued)

poration, as lessee, shall be deemed to have been paid as part of the fixed weekly rent payments hereunder for such period, and that, notwithstanding any other provision of this lease, the entire amount of the fixed weekly rent payable hereunder for such period remaining unpaid prior to the date of the actual execution and delivery of this lease shall be paid by Lessee in installments of One Hundred and Fifty Dollars ($150), per week, commencing on the first day of the lease week immediately following such last-mentioned date, it being agreed that if Lessee shall make default in the payment of any such installment when due, and such default shall continue for a period of two (2) days after written notice thereof from Lessor, the entire amount of the then remaining unpaid balance of the fixed weekly rent for such period shall forthwith become due and payable); and should a sum equivalent to the total of:

(i) fifteen per cent (15%) of the "gross receipts," as such term is hereinafter defined, during the portion of such eight (8) calendar months that the theatre in the demised premises shall be operated on a "straight picture policy," as such term is hereinafter defined, plus

(ii) twelve and one-half per cent (12½%) of the "gross receipts," during the portion of such eight (8) calendar months that the theatre in the demised premises shall be operated on a "stage show policy," as such term is hereinafter defined,

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Plaintiffs' Exhibit No. 1—(Continued)

exceed the aggregate amount of the fixed rental payable during said eight (8) calendar months, then, and in such event, an additional sum equivalent to the excess thereof, over and above the aggregate amount of the fixed rent for said eight (8) calendar months, payable September 15, 1939.

(b) For and during each period of twelve (12) calendar months from September 1st to August 31st thereafter (each such period being herein sometimes referred to as a "lease year"), a fixed weekly rental of Two Thousand Two Hundred Dollars ($2,200.) for each lease week, payable in advance, on the first day of each and every such week, commencing on September 1st of each lease year, and pro rata of Two Thousand Two Hundred Dollars ($2,200) as the fixed rent for any number of days less than a full week, payable in advance, on the first of said days, and should a sum equivalent to the total of:

(i) fifteen per cent (15%) of the "gross receipts" during the portion of such twelve (12) calendar months that the theatre in the demised premises shall be operated on a "straight picture policy," plus

(ii) twelve and one-half per cent. (12½%) of the "gross receipts" during the portion of such twelve calendar months that the theatre in the demised premises shall be operated on a "stage show policy,"

exceed the aggregate amount of the fixed rent pay-

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Plaintiffs' Exhibit No. 1—(Continued)

able during such twelve (12) calendar months, then, and in such event, an additional sum equivalent to the excess thereof, over and above the aggregate amount of the fixed rent for such twelve (12) months, payable on the 15th day of September immediately following such twelve (12) calendar months.

(c) Such other sums payable, at option of Lessor or otherwise, as rent, as in this lease set forth and provided.

The foregoing rental and all sums which are to be paid or repaid by Lessee to Lessor shall be paid in lawful money of the United States of America to the agent of Lessor located in the building of which the demised premises are a part, or to such other person as Lessor may, be written notice, hereafter designate. All rentals and other sums to be paid or repaid to Lessor shall bear interest at the legal rate from the time when payable hereunder.

The term "gross receipts," as used herein, is intended and shall always be construed to mean: (a) the gross admission receipts derived from the operation of the demised premises; (b) also such sums as may be derived by Lessee from the granting of any concessions, privileges, or rights for the sale of any one or more articles, whether by human agency, automatic vending machine or otherwise, in any part of said premises, or for the use of any of the facilities thereof, including, but not by way of limitation, program, screen and curtain advertising,

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Plaintiffs' Exhibit No. 1—(Continued)

or from any other business that may be conducted in or on the said premises by authority of Lessee; and (c) should Lessee conduct or handle one or more of the matters or things referred to in "(b)" hereof, then and in such event, the profits therefrom derived by Lessee, which profits shall be deemed to be the gross receipts therefrom less the actual cost to Lessee of such articles or facilities, which cost shall include only such salaries, if any, as shall be paid to personnel employed for the purpose of and exclusively handling such sales or facilities.

The term "straight picture policy," as used herein, is intended and shall always be construed to mean the operation of the theatre in the demised premises with a program of entertainment consisting either exclusively of motion picture projections, with or without sound, or of such motion picture projections in conjunction with other theatrical exhibitions or forms of entertainment performed by living persons on the stage requiring less than thirty (30) consecutive minutes in the aggregate for presentation at each performance or an actual aggregate expenditure of less than Four Thousand Five Hundred Dollars ($4,500) per week for expenses directly incurred in connection with such theatrical exhibitions.

The term "stage show policy," as used herein, is intended and shall always be construed to mean the operation of the theatre in the demised premises with a program of entertainment including, in con-

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Plaintiffs' Exhibit No. 1—(Continued)

junction with at least one (1) feature motion picture projection, either vaudeville, dramatic, operatic, orchestral, instrumental or vocal ensemble or other forms of theatrical exhibitions requiring the appearance of living persons on the stage or in any combinations of such theatrical exhibitions, which theatrical exhibitions, other than motion picture projections, shall require at least thirty (30) consecutive minutes in the aggregate for presentation at each performance, and shall require an actual aggregate expenditure at the rate of not less than Four Thousand Five Hundred ($4,500) per week for performers, stage hands, orchestra and other expenses necessarily and directly incurred in good faith in connection therewith.

Lessee shall, and Lessee covenants and agrees that it will, at its sole cost and expense, cause the hereinafter referred to audits showing "gross receipts" to be made, and deliver to Lessor a certified copy of each not later than the respective hereinafter fixed date. Each of such audits shall show the "gross receipts" for the period thereby covered properly segregated into two groups showing the respective portions thereof derived from operations under a "straight picture policy" and derived from operations under a "stage show policy," and shall also show in detail all income and receipts other than from admissions derived by Lessee from the operation of the demised premises and the respective sources thereof, and, if any deductions shall be made from such other income and receipts, the

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Plaintiffs' Exhibit No. 1—(Continued)

details of such deductions. The first of such audits, which shall be furnished on or before September 15, 1939, shall cover the twelve (12) month period of time commencing September 1, 1938, and ending August 31, 1939, and shall include the unexpired four (4) month period of the term demised and subleased by the Indenture of Sublease dated as of October 17, 1935, between Paramount Properties Incorporated, as lessor, and Partmar Corporation, as lessee, remaining prior to the termination and cancellation of said Indenture of Sublease hereinafter provided for in Article XXIV hereof. The remaining audits shall be furnished on or before the 15th day of September of each subsequent lease year, commencing on or before September 15, 1940, and each thereof shall respectively cover the immediately preceding twelve (12) month period of time, commencing with September 1st of the preceding calendar year and ending with August 31st of the same calendar year within which such respective audit is to be furnished.

Each of the hereinabove referred to audits shall be made by a certified public accountant or firm of certified public accountants acceptable to Lessor, and shall be accompanied by a certificate showing that the following has been done in detail by such certified public accountant or firm of certified public accountants in connection with such audit for the entire period covered thereby:

(1) That the income from admissions receipts,

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Plaintiffs' Exhibit No. 1—(Continued)

as shown by the daily box office reports (each of which Lessee hereby agrees shall be signed by the theatre manager and countersigned by an officer of Lessee), were checked to the relative entries in the cash receipts book and that the footings of the latter record were checked; that the total cash bank deposits per daily box office reports were compared with duplicate deposit slips signed by the banks and to the periodic bank statements furnished to Lessee;

(2) That the admissions receipts, by weeks, as recorded in the cash receipts book were separately listed and that the total thereof was reconciled with the relative income account reflected in the operating ledger, general ledger or other appropriate account book maintained by Lessee;

(3) That the daily continuity of ticket numbers was accounted for and the relative extension in respect of the income derived therefrom were checked and compared with the theatre cash receipts book;

(4) That the clerical accuracy of the box office reports was checked and verified;

(5) That any and all refunds shown by the daily box office reports were verified; and

(6) That all gross receipts other than from admissions were verified in detail, and that all deductions from such gross receipts other than from admissions were verified by reference to paid invoices and cancelled checks.

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Plaintiffs' Exhibit No. 1—(Continued)

Lessee shall, within two (2) days after the delivery of a certified copy of each of the hereinabove referred to audits, pay to Lessor any percentage rent which shall have accrued to Lessor under the hereinbefore applicable rental provision of this Article for the period of time covered by the audit. If Lessor shall express its dissatisfaction concerning the audit's accuracy, Lessor shall have the right to make a second audit at its own expense, and if Lessor and Lessee be then unable to compose and adjust their differences within a reasonable time after the second audit shall have been completed, a third audit shall be made by Messrs, Price Waterhouse and Company, certified public accountants, or other mutually satisfactory firm of certified public accountants of equal standing, the expense of which shall be borne equally by Lessor and Lessee, and the amount of the percentage rent, if any, shall be ascertained by using the figures representing the amount of the "gross receipts" shown on the third audit as the base for the computation, and a final cash adjustment and settlement of the percentage rent shall be made within ten (10) days after the completion of the audit. If two audits shall have been had and Lessor and Lessee compose and adjust their differences without a third, a final cash adjustment and settlement of the percentage rent shall be made within ten (10) days after Lessor and Lessee shall have reached an accord. Should this lease be terminated prior to the expiration of the period of time to be covered by any herein-

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Plaintiffs' Exhibit No. 1—(Continued)

above referred to audit, the adjustment of the percentage rent for such part or portion of the demised term shall be had under the arrangement herein provided with respect to an audit for a full period, except that the certified copy thereof shall be delivered to Lessor within fifteen (15) days after the termination of the lease.

It is further understood and agreed: (a) that should the fixed rent for the first eight (8) months of the demised term, or for any subsequent lease year, exceed a sum equivalent to the respective percentages of the "gross receipts" hereinabove specified, the excess shall not be carried over to any other period for the purpose of reducing the amount of the percentage rent payable by Lessee to Lessor under the terms and provisions of this lease for such other period; (b) that the amount of the percentage rent to be paid by Lessee to Lessor, although based upon respective percentages of the "gross receipts," is so much additional rent for the use of the demised premises, and no such payment is intended to, nor shall the same ever, change the relationship of the parties hereto from that of Lessor and Lessee to that of either co-partners joint adventurers, or associates in the conduct of Lessee's business or the latter's operation of the demised premises; and (c) that Lessor shall not be liable for any of the debts incurred by Lessee in connection with the conduct of Lessee's business and/or the operation of the demised premises.

Lessee further covenants and agrees that it will

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Plaintiffs' Exhibit No. 1—(Continued)

keep separate, true and accurate records of the hereinbefore referred to "gross receipts" with respect to the operations on the demised premises, under a separate system of bookkeeping and accounting installed and maintained in accordance with good accounting practice, and that Lessor, through its officers, agents and employees, shall have access at all reasonable times, to the books, accounts, records, supporting vouchers, papers, bank statements, duplicate deposit slips, cancelled checks, cash receipts books, operating ledger and other cash records and documents, and the theatre box office for the purpose of inspection, check-up, making extracts therefrom and/or copies and/or an audit thereof.

Lessee shall, and Lessee hereby agrees to pay, without demand therefor, the rent as in this lease set forth and provided. Should Lessee become obligated to reimburse or otherwise pay Lessor one or more sums of money in addition to the fixed and percentage rents, the amount thereof may, at option of Lessor, be added to any subsequent installment of the fixed rent due and payable under this lease, and Lessor shall have like remedies for default in payment thereof as Lessor would have in the event of a default in the payment of any installment of the fixed rent.

Article III.

Use of Premises

Lessee further covenants and agrees as follows:

(a) To use the demised premises throughout the

Plaintiffs' Exhibit No. 1—(Continued)

entire demised term for the presentation of entertainment consisting of either a "straight picture policy" or a "stage show policy," as such terms are hereinabove defined, and for the operation of such concessions or sale of such articles or facilities as are expressly referred to in Article II hereof, conducting and operating the same in a proper, lawful and reputable manner, and for no other business or purpose whatsoever; it being understood that Lessee may at any time change the operation of the theatre hereby demised from either a "straight picture policy" or a "stage show policy" to the other;

(b) If the theatre shall be operated on a "stage show policy," to present only the best de luxe "Fanchon and Marco" stage shows and presentations or other de luxe stage shows and presentations of the highest class; it being understood, however, that no "Fanchon and Marco" stage show or presentation, whether new, old or otherwise, shall be presented in any theatre in the City of Los Angeles, except in the demised premises, during the term of this lease;

(c) To exhibit in the demised premises during the demised term the motion pictures licensed for exhibition therein pursuant to the franchise agreement dated as of September 1, 1939, by and between Lessor and Lessee, and if Lessee shall exhibit any other motion pictures in addition to the motion pictures licensed pursuant to said agreement such ad-

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Plaintiffs' Exhibit No. 1—(Continued)

ditional motion pictures shall be only the best selection, made by it in good faith, of the highest quality, first-run feature motion pictures now or hereafter available to it (either directly or indirectly, through Fanchon & Marco, Inc., its and/or their subsidiaries, affiliates, associates, agents or legal representatives, or through any party in interest to any operating or management agreement affecting the theatre in the demised premises, or otherwise) for exhibition in the City of Los Angeles;

(d) To continuously conduct and operate the theatre throughout the entire demised term, except to the extent, if any, that it may be prevented from so doing by epidemic, act of God, strikes, repairs or alterations necessary to be made in the proper operation of the theatre (including those specifically provided for in Section 2. of Article VI hereof), and/or any one or more Governmental orders directing the closing of the theatre for a cause or causes not within Lessee's control;

(e) That it will not conduct its business in or upon the demised premises, or any department thereof, in competition with any business conducted on the date of this lease by either (1) any tenant of any part of the other commercial space of the building in which the demised premises are located, or (2) any tenant of any commercial space in any contiguous building or on any contiguous property.

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Plaintiffs' Exhibit No. 1—(Continued)

Article IV.

Water, Electric Light, Etc.

Lessee shall, and Lessee hereby agrees to pay as and when the same shall become due and payable, the theatre license fee, any and all license and/or inspection fees and other charges in connection with the use and operation of any electric sign and the canopy in front of the demised premises, as well as all license and inspection fees imposed by any Governmental authority whatsoever, and in addition thereto, all charges for fuel, heat, water, gas, electric current, for both light and power, used in, on, about or in connection with the demised premises.

Notwithstanding any other provision contained in this lease, it is expressly understood and agreed that if any water shall be used in connection with any theatrical exhibition presented in the demised premises, such as, for example, water used in connection with any ice-skating rink or swimming pool or water tank used in connection with a theatrical exhibition or presentation, the entire amount of water used for such purpose shall be paid for separately by Lessee, such payments (which shall be in addition to any other payments for water provided for in this lease, including the payments provided for in Article XXX hereof) to be made to Lessor promptly upon Lessor's presentation to Lessee of a bill therefor accompanied by reasonably satisfactory evidence that such bill has been correctly computed.

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Plaintiffs' Exhibit No. 1—(Continued)

All electric current consumed in, on, upon or about the demised premises for either light or power shall, at the option of Lessor, be purchased by Lessee through Lessor, the hereinbefore reserved rent not covering or including same. In the event of the exercise of said option, Lessee shall, at the rates and prices therefor prevailing and fixed from time to time by public service companies furnishing such service, pay monthly for the current consumed, it being understood that Lessor shall install meters to register the supply thereof. It is expressly understood and agreed that such supply of current may be discontinued at any time should Lessee fail or omit to pay the amount of any bill therefor within five (5) days after rendition; that such service may, at Lessor's option, be wholly discontinued upon not less than thirty (30) days' previous notice in writing, in which event, Lessee shall have the right to contract or otherwise arrange with any other person, firm or corporation for the further supply of such current; that Lessee shall make no change in and/or addition to the electrical equipment and/or appliances without prior written consent of Lessor in each instance; that the amount of any unpaid bill for such current may, at option of Lessor, be added to any subsequent installment of the fixed rent due and payable under this lease and Lessor shall have like remedies for default in payment thereof as Lessor would have in the event of a default in the payment of any installment of the fixed rent; that Lessor shall be under no obliga-

Plaintiffs' Exhibit No. 1—(Continued)

tion to furnish or supply bulbs or lamps for the lighting fixtures in the demised premises, or the signs or canopy thereof. Lessor hereby reserves the right, in the event of any accident, or in the event of the making of repairs, alterations and/or improvements in the judgment of Lessor desirable or necessary to be made, to stop the service of the steam, plumbing, power and lighting systems, or any one or more of same, until the cause of the accident has been eliminated and/or until the repairs, alterations or improvements shall have been completed. Lessee hereby agrees that Lessor shall have no responsibility or liability whatsoever for not furnishing steam, plumbing, power or lighting service when prevented from so doing by strike, lockout, breakdown, accident, order or regulations of or by any Federal, State or Municipal Governmental authority, failure of water supply, failure of fuel supply, inability by the exercise of reasonable diligence to obtain fuel, inability to obtain necessary parts for repairs, or any other cause beyond Lessor's reasonable control.

Lessee agrees to pay to Lessor, in addition to all other sums referred to herein, that proportion of the cost of maintenance and operation of the night-watch and fire alarm boxes in said Paramount Theatre Building that the number of such boxes situated in the theatre portion of said building from time to time bears to the total number of such boxes in said building. Such payment shall be made an-

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Plaintiffs' Exhibit No. 1—(Continued)

nually upon presentation to Lessee of a receipted bill for such maintenance cost for the current year.

Article V.

Repairs

Lessee shall, throughout the entire term of this lease, at Lessee's sole cost and expense: (a) keep the interior and exterior of the demised premises, the furnishings, fixtures, personal property, equipment, signs and canopy thereof, the theatre air conditioning plant and the mechanical equipment now servicing the theatre in good order, condition and repair, such repairs to include those that are structural as well as non-structural, and the making of necessary substitutions therein, and to be equal in class to the original work; (b) to neither make, nor permit or suffer the commission of any waste, nuisance or injury; (c) replace any and all damaged and/or broken plate, ornamental and other glass; (d) before making any except trivial repairs, notify Lessor of Lessee's intention thereof and obtain Lessor's written consent thereto, before commencing the work; (e) keep all sidewalks abutting upon or adjacent to the demised premises in good order, condition and repair, including the replacing of all broken sidewalk lights, if any such lights there be, and also free and clear of snow, ice, dirt, rubbish and waste material; and (f) at the expiration of the demised term or sooner termination of this lease, surrender the demised premises and the furnishings, fixtures, personal property and equipment thereof,

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Plaintiffs' Exhibit No. 1—(Continued)

in as good order, condition and repair, as reasonable use thereof will permit. Should the Lessee fail or omit to commence promptly and expeditiously complete the work of any repairs herein required by Lessee to be made, then and in such an event, Lessor shall have the right, without the obligation, to make same at the cost and expense of Lessee, and any sums paid by Lessor for any such repairs shall be repaid by Lessee to Lessor, upon the latter's demand therefor. Lessee hereby expressly waives all right to make any repairs at the expense of Lessor under the provisions of any statute, whether now in effect or hereafter enacted, authorizing a tenant to make repairs at the expense of the landlord. Lessor shall, throughout the term of this lease, at Lessor's sole cost and expense, keep the exterior walls and roof of the demised premises in good order and substantial repair unless the necessity therefor shall be due to the carelessness, negligence or improper conduct of Lessee, or Lessee's agents, officers, servants, employees, patrons or visitors. Lessee has examined the demised premises and acknowledges that same and every part thereof are in a good and tenantable condition and that no representations with respect thereto have been made by Lessor, or by Lessor's agents, prior to or at the time of the execution of this lease, and Lessee accepts said premises as satisfactory in their present condition. Lessor shall not be obligated to divide, make any change in, on or to, or install or do anything whatsoever in, to or upon the said

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Plaintiffs' Exhibit No. 1—(Continued)

premises, or any part thereof; nor clean or paint the same, or any part thereof.

Lessee shall be liable to Lessor for all damages or injuries that may be caused to the demised premises, or to the building of which same are a part, by Lessee, or by its agents, officers, servants, employees, customers, patrons, visitors and/or persons making deliveries to Lessee, or in moving any personal property of any whatsoever kind or character in or out of the demised premises. Lessor reserves and shall have the right to make and enforce all reasonable rules and regulations for the use and occupation of the demised premises and Lessee shall comply with all such rules and regulations; and in this regard, Lessee agrees faithfully to observe and strictly comply not only with all rules and regulations now existing, but also such other reasonable rules and regulations hereafter from time to time promulgated as Lessor may, in its judgment, deem necessary or proper for either (a) the safety, care and/or cleanliness of the demised premises and/or the building of which same are a part; (b) the comfort of the other tenants of the building; or (c) the preservation of good order therein. Lessee shall also cause its agents, officers, servants, employees, customers, patrons and visitors to faithfully observe and strictly comply with all such rules and regulations, all of which said rules and regulations are hereby incorporated herein and made a part of this lease.

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Article VI.

Alterations and Improvements

Section 1. Without the prior written consent of Lessor in each instance Lessee shall not install any one or more partitions, nor make any other alteration, addition or improvement in, to or upon the demised premises or the exterior thereof, or any part of either or both. In the event Lessor consents that Lessee may install partitions and/or make one or more other alterations, additions or improvements, the partitions shall be of a type approved by Lessor and they shall be installed and all other alterations, additions and improvements shall be made and done by mechanics and/or contractors approved by Lessor, and Lessee shall pay the entire cost thereof, including the cost of materials and replacements. Under no circumstances whatsoever shall any such consent be extended so as to cover or include anything not specified therein. All alterations, additions and improvements made in, to or upon the demised premises or the exterior thereof, and all partitions, railings, mezzanine floors, galleries and the like placed therein or thereon, shall immediately become, be and always remain the property of Lessor, and remain upon, and without disturbance, molestation or injury be surrendered with, the demised premises as a part thereof.

Section 2. Lessee agrees to make the improvements of the theatre portion of the building on the demised premises specified in Schedule I hereto annexed, consisting of the installation of new fur-

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Plaintiffs' Exhibit No. 1—(Continued)

niture, furnishings, fixtures and equipment and the making of repairs, alterations and redecorations, and to expend approximately the sum of Fifty Thousand Dollars ($50,000) in making such improvements, which shall be completed prior to December 31, 1939; it being expressly agreed that Lessee's failure to complete such improvements on or before said date shall constitute a material breach of, and default under, this lease on the part of Lessee. Lessee further agrees that if and when it shall be able to obtain the necessary permits therefor from the State or Municipal Governmental Authorities (or their respective Departments or Bureaus) having jurisdiction thereof without thereby increasing the cost thereof beyond the approximate amount hereinafter specified, Lessee shall promptly reconstruct and modernize the present marquee over the Sixth Street entrance to the demised premises, including the installation of new fixtures and the making of all necessary structural changes in connection therewith, at an approximate cost of Thirteen Thousand Dollars ($13,000), it being nevertheless agreed that Lessee shall be obligated to do such work forthwith if Lessor, in its sole discretion, shall elect to bear the cost thereof in excess of the approximate cost hereinabove specified. Before proceeding with any such improvements, Lessee shall first submit to Lessor all contracts proposed to be made in connection therewith and detailed plans and specifications for any such improvements involving structural changes, and shall obtain the written ap-

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Plaintiffs' Exhibit No. 1—(Continued)

proval thereof of Lessor, and prior to the commencement of any such improvements, Lessee shall indemnify Lessor by satisfactory indemnity which shall fully save and hold Lessor harmless from any and all costs, charges, expenses and liabilities by reason of any such improvements, or in any way arising out of or in connection therewith. Lessee agrees that all materials to be used and any article or articles which are at any time to be installed in the demised premises in connection with such improvements, shall be fully paid for (or adequate provision made for the payment thereof) by Lessee at the time of the installation of any thereof, and all of the same shall be free from any conditional bills of sale, agreements of lease or other liens, mortgages or encumbrances whatsoever, and Lessee further agrees that in making such improvements it will satisfy and discharge every lawful claim or demand which if unpaid might constitute a lien or charge upon the demised premises or any part thereof in the nature of liens of mechanics, contractors, laborers or material men, and that upon the completion of said work the demised premises shall be free and clear of any and all such liens or charges resulting from the performance of such work, and that all such improvements shall immediately upon the installation thereof become, be and always remain the property of Lessor, and shall remain upon, and without disturbance, molestation or injury be surrendered with, the demised premises as a part thereof. Lessee agrees to protect, indemnify

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Plaintiffs' Exhibit No. 1—(Continued)

and save and keep harmless Lessor of and from any and all loss, cost, damages and expenses whatsoever arising out of or connected with said improvements, including liability to workmen and to other persons on said premises and to persons who may be using the streets and sidewalks adjacent to said premises, and all other liabilities, liens or charges connected with or growing out of the work aforesaid.

It is agreed that Lessee shall have the right to close the theatre in the demised premises while the improvements specified in Schedule I hereto annexed are in the course of being made, and that, notwithstanding any other provisions in this lease contained, Lessee shall not be obligated to pay any rent hereunder for and during the first week of such closing, but shall nevertheless be obligated to pay the fixed weekly rent for and during the remaining period of such closing after such first week.

Lessor agrees that the amounts realized by Lessee from the salvaging or scrapping of any article of furniture, furnishings, fixtures or equipment removed and replaced in connection with said improvements may be applied by Lessee to the cost of said improvements, provided, however, that the same shall be sold or otherwise disposed of only on terms approved by Lessor, it being agreed that no such articles shall be removed or replaced without Lessee's having first obtained Lessor's written consent thereto and that Lessor shall execute any bills of sale or other documents (in form approved by Lessor's counsel) required in connection with such sale

Plaintiffs' Exhibit No. 1—(Continued)

or other disposition of such articles. Within ten (10) days after the completion, in a first-class manner (it being expressly agreed that all upholstery, repainting and redecoration in connection therewith shall be performed to the reasonable satisfaction of Lessor, and that samples of all materials used shall first have been submitted to and approved by Lessor), of all the improvements specified in Schedule I hereto annexed, and within ten (10) days after the completion, in a first-class manner and substantially in accordance with the plans and specifications therefor as approved by Lessor, of the additional improvements to be made thereafter by Lessee as provided in this Section 2, Lessee shall submit to Lessor a statement and report showing in detail all items of cost and expense incurred in connection with such completed improvements and all sums realized by Lessee from the aforementioned salvaging or scrapping of obsolete articles removed from the demised premises in connection therewith, and together with each such statement and report Lessee shall furnish Lessor with receipted bills, vouchers, cancelled checks and such other papers as Lessor may reasonably request to substantiate the items detailed therein and payment (or the provision made for the payment) of the same in full by Lessee. Within thirty (30) days after each such statement and report has been submitted to Lessor, Lessor and Lessee shall execute an appropriate memorandum certifying the exact

Plaintiffs' Exhibit No. 1—(Continued)

total amount of the net cost incurred by Lessee (which shall not include any interest or finance charges whatsoever) in connection with such completed improvements, allocating such net cost to the various items comprising said improvements, and specifying the respective rate at which such cost of each such item shall be amortized. For the purposes of this lease, the certified net cost of said improvements shall be amortized in accordance with standard accounting practices governing the depreciation of the particular items comprising said improvements, but in no event shall the certified net cost of any particular item be amortized over a period longer than the unexpired portion of the period originally limited for the duration of the term of this lease remaining after the date of the actual installation or completion of such item. Lessor hereby agrees that in the event it shall hereafter exercise its right to terminate this lease prior to the date originally limited for the duration of the term hereof in accordance with the provisions of clause (e) of Section 1 of Article XXIX hereof if such right shall be exercised solely by reason of a cancellation and termination of the franchise agreement dated as of September 1, 1939, therein referred to for some reason or cause other than an act of omission by or default or breach thereunder on the part of Lessee, or in accordance with the respective provisions set forth in Sections 3 or 4 of Article XXIX hereof, or in the event that Lessee

Plaintiffs' Exhibit No. 1—(Continued)

shall exercise its right to terminate this lease in accordance with the provisions of Section 2 of Article XXIX hereof, Lessor shall pay over to Lessee upon the date of such termination a sum equal to the then unamortized total amount of the net cost incurred by Lessee in connection with all of said improvements as certified as aforesaid.

Article VII.

Trade Name

It is expressly understood and agreed that the demised premises shall continue to be known under the name "Paramount Theatre" during the entire demised term, unless Lessor and Lessee shall mutually agree upon another name; provided always, however, that should the use of the name "Paramount" be enjoined by an order of a court of competent jurisdiction, Lessor shall select another name and Lessee shall thereafter use such name throughout the then remainder of the demised term. It is further understood and agreed that the name "Paramount Theatre" and/or any other name substituted therefor, under the provisions of the prior sentence hereof, shall, at all times, be and remain the exclusive property of Lessor, and that Lessee shall have no right to use same, except to designate the demised premises during the term hereof, and upon the expiration of the demised term, or sooner termination of this lease, the right to such use shall revert to and revest in Lessor.

Plaintiffs' Exhibit No. 1—(Continued)

Article VIII.

Right of Inspection by Lessor

It is agreed that Lessor and its agents, officers, servants and employees shall have the right, without being obligated so to do, to enter upon the demised premises at all reasonable hours during the demised term for purposes of examining, inspecting and/or making necessary alterations and repairs, all of which shall be done without disturbing Lessee's business any more than necessary.

Article IX.

Indemnity of Lessor

Lessor shall not be liable for, and Lessee covenants and agrees to protect, indemnify and save and keep harmless Lessor and the owner of the fee and/or any mortgagee or trustee under any deed of trust constituting a lien on the demised premises, of and from any and all loss, cost, damages and expenses whatsoever arising out of or connected with any accident or other occurrence on either the demised premises or the sidewalk or sidewalks in front thereof, which shall have caused personal injuries, including death at any time resulting therefrom, and/or damage to property, due or claimed to be due to any act or neglect on the part of Lessee, its agents, officers, servants, employees, patrons or invitees, or due or claimed to be due to failure or omission on the part of Lessee, its agents, officers, servants, employees, patrons or in-

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vitees, to comply with and keep and perform the requirements and provisions of this lease on Lessee's part to be kept, observed, performed and abided by, or due or claimed to be due to Lessee's use of the demised premises.

Article X.

Insurance

Lessee covenants and agrees, at its sole cost and expense, (a) to maintain and keep in full force and effect throughout the entire demised term, fire insurance covering the furnishings, fixtures, personal property and equipment of the demised premises in an amount equal to at least ninety (90) per cent. of the full insurable value thereof, and other adequate insurance against any loss or damage sustained and/or injury to or the death of any one or more persons, including, but not by way of limitation, the insurance required to be carried under the "Workmen's Compensation Insurance and Safety Act of the State of California," and any and all acts amendatory thereof and supplemental thereto, with respect to the employees upon the demised premises, all of which insurance shall be placed with a Board insurance company or companies qualified to do business in the State of California; (b) that the limits of the public liability insurance shall be those specified from time to time by Lessor, but in no event less than Fifty Thousand Dollars ($50,000) and One Million Dollars ($1,000,000); (c) that the named insured under the fire and public liability

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Plaintiffs' Exhibit No. 1—(Continued)

insurance policies shall be Lessor, Lessee, The Anglo California National Bank of San Francisco, as Trustee under a certain Deed of Trust and Mortgage of Chattels dated as of March 1, 1937, as amended and supplemented by a certain Supplemental Trust Indenture and Mortgage of Chattels dated as of March 1, 1939, and/or any other mortgagee or trustee under any mortgage hereafter created constituting a lien on the demised premises and/or building of which same are a part; (d) that if Lessor so requests, to have the public liability insurance covered as a part of any blanket policy carried by Lessor and/or any of its subsidiary or affiliated companies, and to make payment of the premium for such coverage to Lessor upon Lessor's demand therefor; (e) that in the event of the failure on the part of Lessee to procure and maintain any insurance required to be procured and maintained by it pursuant to the provisions hereof, Lessor may, upon notice to Lessee, procure the same, and Lessee agrees to make payment of the premium for any policies of such insurance so taken out or procured by Lessor; and (f) that Lessee shall from time to time deliver to Lessor the policies for such insurance or proper evidence by certificate from the insurance companies covering and carrying said insurance that the insurance required under this lease is being maintained.

Lessee shall neither make, nor permit or suffer to be made, any use of the demised premises and/or

Plaintiffs' Exhibit No. 1—(Continued)

the furnishings, fixtures, personal property or equipment thereof, which will cause an increase in the premium rate of any insurance policy thereon, or in the premium rate of any insurance policy covering the building of which the demised premises are a part and/or the contents thereof; nor shall said premises be used or permitted to be used for any purpose whatsoever other than as in Article III hereof provided. Lessee shall neither make use of, nor permit or suffer any one or more third parties to make use of, the streets or sidewalks abutting the demised premises either for storage, hack, automobile, peanut, lunch-wagon, flower or other stand, or other business, or for any unlawful purpose or purposes; nor for any purpose or purposes that will injure or tend to injure the reputation of the demised premises, or the building of which same are a part. Lessee shall not permit the demised premises to be vacant or unoccupied; nor burn or use or keep thereon, or permit to be burned or used or kept thereon, any gasoline, kerosene, distillate, petroleum, explosive or inflammable substance; nor install or operate any machinery or apparatus which shall tend to injure the building of which the demised premises are a part, or which will annoy other tenants thereof; and in any event, no machinery or apparatus shall be installed or operated on the demised premises without the written consent of Lessor first had and obtained. Any increase of insurance premium on the building of which the de-

Plaintiffs' Exhibit No. 1—(Continued)

mised premises are a part and/or the contents thereof caused by any act or omission on the part of Lessee, its agents, officers, servants or employees, shall be paid by Lessee to Lessor upon demand. Lessee shall, at Lessee's sole cost and expense, install in the demised premises one or more fire extinguishers of such capacity and make as shall meet with the approval of Lessor, and shall periodically cause same to be refilled or recharged; and if Lessee shall fail or omit to install and/or refill and/or recharge such fire extinguishers, Lessor shall have the right to do so at the expense and for the account of Lessee. Lessee shall promptly report to Lessor any damage or injury to the demised premises. Neither Lessee, nor its agents, officers, servants or employees, shall solicit business from the sidewalks, or vestibule or door of the demised premises. Lessee shall neither keep, maintain or place, nor permit or suffer to be kept, maintained or placed, on any sidewalk upon which the demised premises abuts, or in any vestibule or door-way of the demised premises, any show-cases, troughs or counters for any purpose whatsoever, without Lessor's written consent thereto first had and obtained. Lessee shall not sign any petition for, or otherwise consent to the granting of any curb, sidewalk or street concessions or privileges for buses, taxicabs, or to any peddler, news vendor, or any other persons desiring to ply a trade or have a stand or station, or otherwise do business in or about the front of the demised premises.

Plaintiffs' Exhibit No. 1—(Continued)

Article VI.

Signs

Lessee shall have the right, in so far as such right may be given and granted by Lessor, to maintain and operate, at its sole cost and expense, throughout the entire demised term, the present signs, canopy and attraction boards of the latter, and any renewals or replacements thereof; it being expressly agreed that no other sign illuminated or non-illuminated, or canopy or attraction board shall be erected without Lessor's written consent first had and obtained.

Article XII.

Fire Clause

Should the demised premises be damaged by fire, earthquake or other catastrophe, Lessee shall give immediate notice thereof to Lessor, and unless this lease be terminated as in this Article hereinafter provided, the damage thereto shall be repaired as speedily as possible after receipt of such notice, by and at the cost and expense of Lessor. If public performances may not be held in the demised premises as a result of such damage and the damage be not due to any fault or neglect on the part of Lessee, its agents, officers, servants, employees, patrons or visitors, from and after receipt by Lessor of Lessee's notice of the damage, rent shall cease until the repairs have been completed to such an extent as to permit resumption of public perform-

Plaintiffs' Exhibit No. 1—(Continued)

ances. If as a result of fire, earthquake or other catastrophe the building of which the demised premises are a part be destroyed or so damaged (whether the demised premises be damaged or not), that Lessor shall decide either to rebuild or not to rebuild, or to repair and/or restore or not to repair and/or restore, notwithstanding any present or future law or statute to the contrary, Lessor shall have the right to cancel and terminate this lease and end the term thereby demised within sixty (60) days from the date of the destruction or damage, by sending to Lessee, at the address hereinafter specified, written notice to that effect by registered United States mail, not less than five (5) days prior to the termination date fixed in and by said notice; and upon the mailing of such notice, this lease shall expire and be cancelled and terminated and the term thereby demised come to an end by lapse of time on the termination date in said notice specified as fully and completely as if that day were the date in this lease distinctly fixed for the expiration of the demised term, and Lessee shall, and Lessee hereby agrees to, vacate and surrender the demised premises on said termination date. Should any question arise between Lessor and Lessee as to whether or not the repairs in this Article referred to have been made with reasonable dispatch, due allowance shall be made for delays connected with the adjustment of the loss under the insurance policies and delays caused by or due to what are commonly known as "labor troubles." Should this lease be

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cancelled and terminated pursuant to any provision thereof, and Lessee vacate and surrender the demised premises in compliance with the notice thereof sent by Lessor, Lessor shall return to Lessee, if Lessee be not in default under this lease, a pro rata of any installment of rent paid by Lessee for a period of time extending beyond the date of the vacation and surrender.

Article XIII.

Condemnation

Should the demised premises or the building of which said premises are a part, or the land upon which said building is erected and/or any vacant part or portion of said land, or any one or more of same, or any part or portion of any one or more of same, be taken by virtue of the power of eminent domain or for any public or quasi-public improvement or purpose, Lessor, at its option, may cancel and terminate this lease and end the term thereby demised by sending to Lessee, at the address hereinafter specified, written notice to that effect by registered United States mail, not less than five (5) days prior to the termination date fixed in and by said notice, and upon the mailing of such notice this lease shall be cancelled and terminated and the term thereby demised come to an end by lapse of time on said termination date as fully and completely as if that day were the date in this lease distinctly fixed for the expiration of the demised term, and Lessee shall, and Lessee hereby agrees to

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vacate and surrender the demised premises within five (5) days after the mailing of such notice. If in any condemnation or similar proceeding, whether or not same results in a partial or total taking of the demised premises, an award accrue or be payable as a result of the taking, the entire award shall, as between Lessor and Lessee, be and become the sole and absolute property of Lessor and Lessee shall not be entitled to any part or portion thereof. Should this lease be cancelled and terminated pursuant to the foregoing provisions of this Article and Lessee vacate and surrender the demised premises in compliance with and pursuant to the hereinbefore referred to notice, Lessor shall return to Lessee, if Lessee be not in default under this lease, a pro rata of any installment of rent paid by Lessee for a period of time extending beyond the date of the vacation and surrender.

Aricle XIV.

Taxes

Lessee shall, and Lessee agrees to pay, throughout the entire demised term, all taxes and assessments of every kind or description that may be levied upon or assessed against any furnishings, fixtures, personal property and equipment in the demised premises owned by Lessee.

The furnishings, fixtures, personal property and equipment in the demised premises belonging to Lessor on the date hereof are listed in an inventory covering same, a copy of which is attached hereto,

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Plaintiffs' Exhibit No. 1—(Continued)

marked Exhibit A, and by this reference thereto incorporated herein and made a part of this lease.

Article XV.

Subordination

This lease is now, and shall always be subject and subordinate to: (a) the Deed of Trust and Mortgage of Chattels dated as of March 1, 1937, made by Paramount Properties, Incorporated, to The Anglo California National Bank of San Francisco, as Trustee, as amended, modified and supplemented by that certain Supplemental Trust Indenture and Mortgage of Chattels dated as of March 1, 1939, by and among Paramount Pictures Inc., The Anglo California National Bank of San Francisco, as Trustee, and The First National Bank of Chicago, including any and all renewals or extensions thereof; (b) any one or more other mortgages, deeds of trust or instruments in the nature of a mortgage heretofore or hereafter given to refund or refinance the mortgage and deed of trust referred to in (a) hereof; and (c) any and all other mortgages now or hereafter a lien or liens on the demised premises and/or the building of which same are a part, and any and all advances heretofore or hereafter made under the security thereof.

Lessee covenants and agrees to execute, acknowledge and deliver upon request, all documents demanded by Lessor which the latter may deem neces-

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sary or desirable to further effect the subordination of this lease to any of the above-referred-to mortgages and/or deeds of trust and/or instruments in the nature of a mortgage, and upon Lessee's failure or omission to execute, acknowledge and deliver same within five (5) days after Lessor's written request therefor, Lessor may execute and deliver the necessary instruments of subordination in the name of Lessee and on its behalf and as its agent and attorney-in-fact; and Lessee hereby irrevocably constitutes and appoints Lessor its agent and attorney-in-fact for said purpose, and it hereby ratifies and confirms any and all acts done by Lessor in pursuance hereof.

Article XVI.

Liens for Labor or Materials

Lessee shall keep the demised premises and the building of which same are a part, free and clear of any and all liens arising out of or connected with the making by Lessee of any repairs, improvements, additions or alterations in, to, upon or about the demised premises; and should any such lien become a charge against said premises, Lessee shall promptly pay and satisfy and discharge the same. If Lessee fails or omits so to do, then and in such an event, Lessor may pay same and any amount so paid by Lessor shall be repaid by Lessee on Lessor's demand therefor, or Lessor may, at its option, add same to any subsequent installment of

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Plaintiffs' Exhibit No. 1—(Continued)

the fixed rent payable under this lease and Lessor shall have like remedies for default in payment thereof as Lessor would have in the event of a default in the payment of any installment of such fixed rent.

Article XVII.

Waiver of Breach and Cumulative Rights

It is further covenanted and agreed by and between the parties hereto: (a) that none of the terms, covenants, conditions, agreements, obligations, provisions or undertakings of this lease to be kept or performed by Lessee shall in any manner be waived, amended, altered, modified or abandoned, except by a written instrument duly signed and delivered by Lessor, and not otherwise, and that no act or acts, omission or omissions, or delays, or series of acts or omissions, or waiver, acquiescence of forgiveness by Lessor as to any failure of performance, either in whole or in part, by Lessee of any of the terms, covenants, conditions, agreements, obligations, provisions or undertakings of this lease shall be deemed or construed to be a waiver by Lessor of the right at all times in the future to insist upon the full and complete performance by Lessee of each and all of the said terms, covenants, conditions, agreements, obligations, provisions and undertakings thereafter to be kept or performed hereunder; nor shall an acceptance of surrender of this lease be effected without a written consent thereto by Lessor; and (b) that,

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Plaintiffs' Exhibit No. 1—(Continued)

subject to the provisions of Article XXVIII hereof, all rights and remedies of Lessor and Lessee under this lease shall be cumulative and that none shall exclude any other legal or equitable rights and remedies.

Article XVIII.

Holding Over

Any holding over after this lease shall have expired, whether by lapse of time or otherwise, with the consent expressed or implied of Lessor, shall be a tenancy from week to week at a weekly rental, payable in advance, equal to the weekly installment of the fixed rent, as increased by a pro rata of the highest audit period percentage rent, theretofore paid or theretofore payable hereunder. Such week to week tenancy shall be subject to termination at the end of any week on three (3) days' written notice to Lessee, and shall otherwise be on all the terms, covenants, conditions, agreements, obligations, provisions and undertakings in this lease set forth and contained so far as applicable.

Article XIX.

Law and Insurance Observance

Lessee shall neither bring to, have, keep, sell or give away, nor knowingly permit or suffer any other person or persons to bring to, have, keep, sell or give away, in, upon or about the demised premises, or any part thereof, any intoxicating beverage whatsoever; and Lessee shall neither do,

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Plaintiffs' Exhibit No. 1—(Continued)

nor permit or suffer to be done, in, upon or about the demised premises, or any part thereof, any act which shall or might subject Lessor to any liability or responsibility whatsoever under or by reason of the provisions of any statute, ordinance or other law.

Lessee shall comply with all notes, notices, rules, orders, recommendations, regulations and requirements involving the making of structural and/or non-structural alterations, repairs, improvements and changes, of all Federal, State and Municipal Governmental authorities and their several respective Departments and Bureaus, in, to or upon the demised premises and/or the furnishings, fixtures, personal property and equipment therein and/or the occupancy and use thereof. Lessee shall also comply with all Federal and State statutes and Municipal ordinances relative to said premises and/or said furnishings, fixtures, personal property and equipment and/or said occupancy and use. Lessee shall also comply with all rules, orders, regulations and requirements of the California Board of Fire Underwriters, the Los Angeles Fire Insurance Exchange, or local Inspection and Rating Bureaus, and similar bodies, involving structural and/or non-structural matters and things.

Article XX.

Assignment and Subletting

Lessee shall not, without the written consent of Lessor, either assign, mortgage, pledge or hypothe-

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Plaintiffs' Exhibit No. 1—(Continued)

cate this lease, in whole or in part, or any interest therein, or sublet the demised premises, or any part thereof, and no such consent given shall be construed to cover any subsequent assignment or subletting. No assignment or subletting shall be valid unless an executed duplicate copy of the written instrument covering same shall have been delivered to Lessor; nor shall any assignment or sublease release or discharge Lessee from any of its liability under this lease, including, but not by way of limitation, Lessee's liability to pay the hereinbefore reserved rent for the then remainder of the demised term. By the acceptance of any assignment, however, the assignee shall, from and after the date thereof, be obligated and bound to keep and perform all of the terms, covenants, conditions, agreements, obligations, provisions and undertakings of this lease, including, but not by way of limitation, the covenant to pay the rent therein reserved and accruing from the date of such assignment.

Article XXI.

Abatement

If, during the demised term, under any present or future laws or any other Governmental authority, any order of abatement or any order or judgment preventing the use of the demised premises by Lessee shall be made upon the ground that said premises either in whole or in part, constitutes a nuisance, or are or have been used in violation of law by Lessee, or by Lessee's officers, servants,

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Plaintiffs' Exhibit No. 1—(Continued)

employees, patrons, or invitees, then and in such an event, Lessee shall not be released thereby from any of Lessee's liabilities or obligations under this lease, including, but not by way of limitation, Lessee's liability and/or obligation to pay the hereinbefore reserved fixed rent.

Article XXII.

Provision for Notice

Each and every notice required to be given by Lessor under the terms and provisions of this lease shall be in writing and be enclosed in a sealed post-paid envelope and be sent by registered United States mail addressed to Lessor, Seventh Floor, 1501 Broadway, New York City, New York, with the envelope further marked "for the attention of the Legal Department," and a copy thereof sent in a sealed post-paid envelope by registered United States mail addressed to Lessor, at 323 West Sixth Street, Los Angeles, California. Each and every notice required to be given to Lessee under the terms and provisions of this lease shall be in writing and be enclosed in a sealed post-paid envelope and be sent by registered United States mail addressed to Lessee at Paramount Theatre Building, 325-329 West Sixth Street, Los Angeles, California.

If either party should change its address and serve written notice of the change upon the other, using a writing sent by registered United States mail as the means of communication, all subse-

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quent notices above referred to shall be sent to the new address.

Article XXIII.

Quiet Enjoyment

Lessor hereby covenants, that subject to the provisions of Article XV hereof, Lessee, on paying the rent herein reserved, and keeping, observing, performing and abiding by each and every of the terms, covenants, conditions, agreements, obligations, provisions and undertakings of this lease on the part of Lessee to be kept, observed, performed and abided by, shall and may peaceably and quietly have, hold and enjoy the demised premises, free from molestation, eviction or disturbance by Lessor, or by any other person or persons claiming through or under Lessor, provided and in no event shall this covenant be binding on Lessor after the date of any conveyance by it of its title to the demised premises. If Lessor assigns this lease, however, this covenant of quiet enjoyment shall be binding upon its assignee.

Article XXIV.

Cancellation of Current Sublease

In consideration of the execution and delivery of this lease by Lessor and Lessee, and the sum of One Dollar ($1.00) by each to the other in hand paid on the delivery hereof, receipt of which is hereby acknowledged, the Indenture of Sublease of the hereinbefore demised premises, made by and

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Plaintiffs' Exhibit No. 1—(Continued)

between Paramount Properties, Incorporated (the predecessor in interest of Lessor), and Lessee as of the 17th day of October, 1935, as said Indenture of Sublease has been heretofore amended and/or supplemented, shall be, and the same hereby is, cancelled and terminated, and the demised term thereof brought to an end, as of the close of business on the 31st day of December, 1938; it being expressly understood and agreed that such cancellation and termination shall be without prejudice to any rights or liabilities arising under the terms and provisions of said Indenture of Sublease as heretofore amended and/or supplemented for and during the period up to the effective date of such cancellation and termination, including specifically, but without in any way limiting the generality of the foregoing, any and all rights and obligations with respect to the payment of the rents, fixed, percentage or otherwise, and the payment of damages and any other sum or sums due under such terms and provisions for the period up to and including December 31, 1938, all of which rights and obligations are hereby expressly reserved and excluded from such cancellation and termination.

Article XXV.

Damage to Property

It is further understood, and Lessee hereby agrees: (a) that Lessor shall not be responsible or liable for (1) any injury to any person, including death resulting at any time therefrom; or (2) any

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damage or injury to the demised premises or to any property whatsoever thereon, due to or caused by steam, gas, electricity, water, rain, snow or ice which may escape or leak and/or flow from, into or within any part of the building of which the demised premises are a part, or from the pipes, wires, appliances or plumbing works thereof, or from any other building, place or quarter; or (3) any damage or injury due to the act or neglect of any other tenant or occupant of said building, or due to any latent defect in said building, or due to the act or neglect of any owner or occupant of adjacent or contiguous property; or (4) any damage to property, or personal or other injury, from any cause whatsoever, whether or not same results from one or more acts of omission or commission by or on the part of any one or more of Lessor's agents, officers, servants, employees or contractors; or (5) any interference with the light or any other incorporeal hereditament resulting from or caused by acts of third parties, or resulting from or caused by any public or quasi-public work by or for any Governmental authority whatsoever; or (6) any inconvenience, discomfort or interruption of business resulting from or due to the making of repairs, improvements or alterations in, to or upon the building of which the demised premises are a part, or any part thereof, and/or any of the fixtures therein and/or any of the appurtenances or equipment thereof; or (7) any circumstance or condition not within Lessor's control; and (b) that no curtail-

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ment of space in the demised premises due to or arising out of a compliance with the provisions of Article XIX hereof, shall ever be deemed actual or constructive eviction, and that no claim shall be made or allowed therefor either by way of damages, diminution or abatement of rent, or otherwise.

Article XXVI.

Lessee's Bankruptcy, Etc.

For the more effectual securing to Lessor of the rent and other payments herein provided, it is agreed as a further consideration of this lease that if Lessee be adjudicated a bankrupt, or if a petition for reorganization of Lessee be filed by or against it under the provisions of the National Bankruptcy Act or any amendment thereof and approved by the court in which the same be filed, the happening of such event shall be deemed to constitute a breach of this lease, and upon such adjudication of bankruptcy or approval of such petition, this lease shall ipso facto and without entry or other action by Lessor become and be terminated; and notwithstanding any other provisions of this lease, Lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the difference between the then cash value of the hereinbefore reserved fixed rent for what would have constituted the remainder of the demised term were it not for such termination, and the then cash rental value of the demised premises for said remainder of said

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term at the time of such termination, the claim for which said agreed damages shall be an immediate provable claim in such bankruptcy or reorganization proceeding; and in making said computation the then rental value of the demised premises for what would have constituted the remainder of said term were it not for such termination, shall be deemed prima facie to be the rental realized upon any reletting if such reletting be accomplished by Lessor within the period of time after the adjudication in the bankruptcy or reorganization proceeding within which its claim must be filed to permit of the adoption of said rental value by it in said claim, and the then present cash value of future rent and future rental value shall be deemed to be such sums as invested at four per cent (4%) simple interest will produce the future rent or rental value, as the case may be, over the period of time in question.

Article XXVII.

Lease Guarantor's Bankruptcy, Etc.

For the more effectual securing to Lessor of the rent and other payments herein provided, it is agreed as a further consideration of the execution and delivery of this lease by Lessor that if Fanchon & Marco, Inc., a corporation organized and existing under the laws of the State of California, (the guarantor of Lessee's performance of all the terms, covenants, conditions, agreements, obligations, provisions and undertakings, including, but not by

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way of limitation, the payment of the rents, fixed, percentage or otherwise, the payment of the damages specified in Article XXVI, this Article XXVII and Article XXVIII hereof, and the payment of any other sum or sums when due to Lessor under this lease, in this lease set forth and contained on the part of Lessee to be kept, observed, performed and abided by) be adjudicated a bankrupt, or makes a general assignment for the benefit of creditors, or if a petition for reorganization of said Fanchon & Marco, Inc., be filed by or against it under the provisions of the National Bankruptcy Act or any amendment thereof and approved by the court in which the same be filed, the happening of any such event shall be deemed to constitute a breach of this lease by Lessee, and upon such adjudication in bankruptcy, or approval of such petition, or the making of such assignment, as the case may be, this lease shall ipso facto and without entry or other action by Lessor become and be terminated; and notwithstanding any other provisions of this lease, Lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the difference between the then cash value of the hereinbefore reserved fixed rent for which would have constituted the remainder of the demised term were it not for such termination, and the then cash rental value of the demised premises for said remainder of said term at the time of such termination, the claim for which said agreed damages shall also be an immedi-

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ate provable claim in such bankruptcy or reorganization proceeding, or with the assignee for the benefit of creditors, as the case may be, under the guaranty of said Fanchon & Marco, Inc., hereto annexed; and in making said computation the then rental value of the demised premises for what would have constituted the remainder of said term were it not for such termination, shall be deemed prima facie to be the rental realized upon any reletting if such reletting be accomplished by Lessor within the period of time after the institution of such proceeding or the making of such assignment, as the case may be, within which its claim must be filed to permit of the adoption of said rental value by it in said claim, and the then present cash value of future rent and future rental value shall be deemed to be such sums as invested at four per cent (4%) simple interest will produce the future rent or rental value, as the case may be, over the period of time in question.

For the more effectual securing to Lessor of the rent and other payments herein provided, it is agreed as a further consideration of this lease that if receivership proceedings (other than the appointment of a receiver in a bankruptcy or reorganization proceeding under the provisions of the National Bankruptcy Act or any amendment thereof), shall be instituted against said Fanchon & Marco, Inc., which shall not have been discharged within sixty (60) days after being instituted, such receivership proceedings shall be deemed to consti-

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tute a breach of this lease by Lessee, and upon the expiration of said thirty (30) days, it shall be lawful, at Lessor's option, without further notice to Lessee, for Lessor to reenter the demised premises, remove all persons therefrom, repossess itself of said demised property, realty and personalty, and either

(a) terminate this lease, in which event Lessee agrees immediately to pay to Lessor as agreed damages for Lessor's damage arising out of such breach of this lease, a sum of money equal to the difference between the then cash value of the hereinbefore reserved fixed rent for what would have constituted the remainder of the demised term were it not for such termination, and the then cash rental value of the demised premises for said remainder of said term at the time of such termination, the claim for which said agreed damages shall also be an immediate provable claim in such receivership under said guaranty by Fanchon & Marco, Inc., hereto annexed; and in making said computation the then rental value of the demised premises for what would have constituted the remainder of said term were it not for such termination, shall be deemed prima facie to be the rental realized upon any reletting if such reletting be accomplished by Lessor within the period of time within which its claim must or may be permitted to be filed to permit of the adoption of

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said rental value by it in said claim, and the then present cash value of future rent and future rent and future rental value shall be deemed to be such sums as invested at four per cent (4%) simple interest will produce the future rent or rental value, as the case may be, over the period of time in question; or

(b) Relet the demised premises as the agent and for the account of Lessee upon such terms as Lessor may deem advisable, in which event, the rents received on such relettings shall be applied first to the expenses, if any, incurred by Lessor for necessary decorating and repairs in connection with the demised premises, or by reason of the breach of any of the terms, covenants, conditions, agreements, obligations, provisions and undertakings of this lease, and all expenses reasonably incurred in recovering possession of the demised premises, including all costs and commissions of such reletting and all attorneys' fees in connection with such termination or reletting, and thereafter toward the payment of all sums due or to become due to Lessor hereunder, and if a sufficient sum shall not be thus realized to pay the rent and other charges herein provided for, Lessee shall pay to Lessor monthly, the monthly deficiency, if any, and Lessor may sue for each monthly deficiency monthly as it shall arise, and any suit brought to enforce the collection of the

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amount of the deficiency for any month shall not prejudice in any way the right of Lessor to enforce collection of the deficiency for any subsequent month by a like or similar proceeding, and if there shall be any over-plus the same shall be paid to Lessee.

Article XXVIII.

Default Provisions

All the terms, covenants, conditions, agreements obligations, provisions and undertakings on the part of Lessee to be kept, observed, performed and abided by hereunder are conditions precedent to be kept, observed, performed and abided by by Lessee to entitle Lessee to continue in possession of the demised premises under this lease, and if Lessee shall make default either in the payment of the hereinbefore reserved rent, fixed, percentage or otherwise, or of any other sum hereunder when due to Lessor, as herein provided, or any part or portion of any one or more of them, and such default shall continue for a period of ten (10) days after written notice thereof from Lessor, or in the observance or performance of any other of said terms, covenants, conditions, agreements, obligations, provisions and undertakings, and such default be not cured or remedied within fifteen (15) days after written notice thereof from Lessor, or if Lessee be adjudged an insolvent debtor under the insolvency debtor laws of any state, or if any execution or attachment be issued against Lessee

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or against any of Lessee's property or effects and if as a result thereof there shall be an actual or attempted taking or occupation of the demised premises by someone other than Lessee, or if Lessee shall make a general assignment for the benefit of Lessee's creditors or be placed in liquidation, or if receivership proceedings shall be instituted against Lessee and not discharged within sixty (60) days after being instituted, or if in any such receivership proceeding a receiver, liquidator, keeper or other officer or agent shall be appointed and not discharged within three (3) days after appointment, or if this lease, or any interest or estate created thereby shall vest in any other person or persons by operation of law or otherwise, except by the written consent of Lessor and except by the death of an individual lessee, or if Lessee shall fail to take possession of the demised premises hereunder or shall abandon or vacate said premises (unless Lessor shall, by notice in writing, accept surrender thereof and thereunder expressly release Lessee from all obligations thereunder), then and in any of said events, it shall be lawful, at Lessor's option, without further notice to Lessee, for Lessor to reenter the demised premises, either with or without process of law, remove all persons therefrom, repossess itself of said demised property, realty and personalty (it being understood that no reentry hereunder by Lessor shall be construed as an election to terminate this lease un-

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less written notice to that effect shall be given by Lessor to Lessee), and either

(a) Terminate this lease, in which event Lessee agrees immediately to pay to Lessor as agreed damages for Lessor's damage arising out of such breach of this lease, a sum of money equal to the difference between the then cash value of the hereinbefore reserved fixed rent for what would have constituted the remainder of the demised term were it not for such termination, and the then cash rental value of the demised premises for said remainder of said term at the time of such termination; and in making said computation the then rental value of the demised premises for what would have constituted the remainder of said term were it not for such termination, shall be deemed prima facie to be the rental realized upon any reletting if such reletting be accomplished by Lessor within six (6) months after such termination, and the then present cash value of future rent and future rental value shall be deemed to be such sums as invested at four per cent (4%) simple interest will produce the future rent or rental value, as the case may be, over the period of time in question; or

(b) Relet the demised premises as the agent and for the account of Lessee upon such terms as Lessor may deem advisable, in which event,

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the rents received on such relettings shall be applied, first, to the expenses, if any, incurred by Lessor for necessary decorating and repairs in connection with the demised premises, or by reason of the breach of any of the terms, covenants, conditions, agreements, obligations, provisions and undertakings of this lease, and all expenses reasonably incurred in recovering possession of the demised premises, including all costs and commissions of such reletting, and all attorneys' fees in connection with such termination or reletting, and thereafter toward the payment of all sums due or to become due to Lessor hereunder, and if a sufficient sum shall not be thus realized to pay the rent and other charges herein provided for, Lessee shall pay to Lessor monthly, the monthly deficiency, if any, and Lessor may sue for each monthly deficiency monthly as it shall arise, and any suit brought to enforce the collection of the amount of the deficiency for any month shall not prejudice in any way the right of Lessor to enforce collection of the deficiency for any subsequent month by a like or similar proceeding, and if there shall be any over-plus the same shall be paid to Lessee.

If Lessor shall commence any summary action or proceeding under any unlawful detainer act or similar statute for the forfeiture of this lease and/or for the possession of the premises thereby

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demised, then Lessor shall have the right, upon two (2) days' notice, to have a receiver appointed by the court to take possession of said premises and collect any rent that may be or become due from any subtenant and to hold the same during the pendency of said action, subject to final disposition by the court; and if such a receiver be appointed at the instance of Lessor, such receiver may, if it be necessary or convenient in order to collect such rents and the profits derived from any business carried on upon said premises, conduct the business of Lessee then being carried on upon said premises and take possession of any personal property belonging to Lessee and used in the conduct of such business, and use the same in conducting such business upon said premises without compensation to Lessee. Lessee hereby appoints Lessor as Lessee's attorney-in-fact, with irrevocable power during the pendency of any such summary action or proceeding and until the appointment of such a receiver, to collect from any and all subtenants the rents due or to become due from any such subtenant during the pendency of any such proceeding. Lessee hereby waives any and all rights of redemption of said premises that is now or may hereafter be given by any such statute or otherwise, and also waives any and all notices to dispossess Lessee preliminary to the institution of any such summary proceeding.

In the event this lease be terminated under any such summary action or proceeding, notwithstand-

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ing any other provisions of this lease. Lessee hereby agrees and Lessor shall forthwith upon such termination be entitled to recover damages for such breach either

(a) In an amount equal to the difference between the then cash value of the hereinbefore reserved fixed rent for what would have constituted the remainder of the demised term were it not for such termination, and the then cash rental value of the demised premises for said remainder of said term at the time of such termination; and in making said computation the then rental value of the demised premises for what would have constituted the remainder of said term were it not for such termination, shall be deemed prima facie to be the rental realized upon any reletting if such reletting be accomplished by Lessor within six (6) months after such termination, and the then present cash value of future rent and future rental value shall be deemed to be such sums as invested at four per cent (4%) simple interest will produce the future rent or rental value, as the case may be, over the period of time in question; or

(b) Relet the demised premises as the agent and for the account of Lessee upon such terms as Lessor may deem advisable, in which event, the rents received on such relettings shall be applied, first, to the expenses, if any, incurred

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by Lessor for necessary decorating and repairs in connection with the demised premises, or by reason of the breach of any of the terms, covenants, conditions, agreements, obligations, provisions and undertakings of this lease, and all expenses reasonably incurred in recovering possession of the demised premises, including all costs and commissions of such reletting, and all attorneys' fees in connection with such termination or reletting, and thereafter toward the payment of all sums due or to become due to Lessor hereunder, and if a sufficient sum shall not be thus realized to pay the rent and other charges herein provided for, Lessee shall pay to Lessor monthly, the monthly deficiency, if any, and Lessor may sue for each monthly deficiency monthly as it shall arise, and any suit brought to enforce the collection of the amount of the deficiency for any month shall not prejudice in any way the right of Lessor to enforce collection of the deficiency for any subsequent month by a like or similar proceeding, and if there shall be any over-plus the same shall be paid to Lessee.

It is agreed that in reletting under any of the provisions of this Article, Lessor shall have, and Lessor is hereby given, the optional right to relet the demised premises, or any part thereof, either in the name of Lessor or otherwise, for a term or terms which may, at Lessor's option, exceed or be

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Plaintiffs' Exhibit No. 1—(Continued)

less than the period which would have constituted the balance of the term of this lease but for such termination.

Lessee shall indemnify Lessor against, and shall pay and discharge any and all reasonable or proper costs and expenses (including all reasonable attorneys' and counsel fees) that may at any time or times result from, or arise out of, or that Lessor may be put to, sustain or incur by reason of any default or failure on the part of Lessee to comply in any respect with, or to observe any requirement or provision of this lease, or that Lessor may sustain, or be put to, or incur, in enforcing or properly seeking to enforce, any of the terms, covenants, conditions, agreements, obligations, provisions and undertakings hereof. And if any suit or action shall be commenced against Lessor by Lessee, or any assignee or subtenant of Lessee, in respect of any matter arising out of this lease, and Lessor shall wholly or partly prevail in any such suit or action, then and in such an event, Lessee shall also pay the costs and expenses of Lessor in connection with any such suit or action, together with Lessor's reasonable attorneys' and counsel fees therein. Whenever such attorneys' or counsel fees are paid or incurred by Lessor in connection with any court proceeding whatsoever in respect of any matter arising out of this lease, the reasonable amount thereof shall, if possible, be determined and fixed by the court having jurisdiction of any such court proceeding.

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Plaintiffs' Exhibit No. 1—(Continued)

Recourse by Lessor to any deposit, guaranty, collateral engagement, or other security for Lessee's performance of all or any of the terms, covenants, conditions, agreements, obligations, provisions and undertakings herein shall be cumulative, independent of and in addition to any and all other rights and remedies of Lessor, whether contained in this lease or in another instrument or otherwise, or provided for by law, and Lessor shall not be required to exhaust or look to any such security before exercising or prosecuting any of such other rights or remedies. Lessor may transfer and/or deliver any such security, as such, to the purchaser of the reversion in the event that the reversion be sold, and thereupon Lessor shall be discharged from any further liability in reference thereto. No delay of Lessor in enforcing any right, remedy, privilege or recourse accorded to Lessor, or which Lessor may become entitled to recoveries thereon, shall affect, impair, diminish, suspend or exhaust any of such rights, remedies, priviliges or recourses. In the event of a breach or threatened breach by Lessee of any of the terms, covenants, conditions, agreements, obligations, provisions and undertakings of this lease, Lessor shall be entitled to apply for and to obtain an injunction to prevent said breach or threatened breach, and Lessee hereby waives the benefit of every statute and/or rule declaring or defining either remedies or rights by or for injunction that may otherwise operate to prevent the issuance of any injunction against Lessee.

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Plaintiffs' Exhibit No. 1—(Continued)

If Lessee should make default in the fulfilling, keeping, observing, performing or abiding by of any or all of the terms, covenants, conditions, agreements, obligations, provisions and undertakings in this lease set forth and contained on the part of Lessee to be fulfilled, kept, observed, performed and abided by, Lessor may, at Lessor's option, immediately, or at any time thereafter, without notice, perform same for the account of Lessee, and Lessee shall immediately, upon demand, pay Lessor the moneys expended and/or the expenses incurred by Lessor in connection therewith, or Lessor may, at its option, add the amount thereof to any subsequent installment of the hereinbefore reserved fixed rent, and Lessor shall have like remedies for default in payment thereof as Lessor would have in the event of a default in the payment of any installment of said fixed rent.

Article XXIX.

Cancellation of This Lease

Section 1. Lessee covenants and agrees that at all times during the hereinbefore demised term all of the issued and outstanding capital stock of Lessee shall be owned and held by Fanchon & Marco, Inc., the guarantor hereinbefore mentioned, or that a majority of said stock shall be owned and held by the persons constituting the owners and holders of a majority of the issued and outstanding capital stock of said Fanchon & Marco,

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Plaintiffs' Exhibit No. 1—(Continued)

Inc., as hereinafter provided, and that a majority of said stock of said Fanchon & Marco, Inc., shall at all such times be owned and held by Marco Wolff, Fanchon Simon, H. C. Arthur, Jr., Sam Dembow, Jr., and J. A. Partington, or by any three of them, and if at any time or times during the demised term either: (a) the capital stock of Lessee or a majority of the capital stock of said Fanchon & Marco, Inc., shall cease to be so owned and held, whether due to the voluntary act of any one or more of the aforementioned parties, or by operation of law; or (b) if less than two of said persons hereinabove named shall be in actual charge of the conduct, management or operation of the theatre on the demised premises or the booking or contracting of motion pictures to be exhibited thereat; or (c) Lessee shall merge, combine or consolidate with any other firm or corporation or enter into an arrangement by which the motion picture photoplays to be exhibited at the theatre on the demised premises shall be contracted for or booked for exhibition by any one person, firm or corporation other than by Lessee and at least two of said persons hereinabove named; or (d) Lessee or said Fanchon & Marco, Inc., shall have forfeited or lost its charter and such forfeiture shall not have been rescinded or set aside or said charter not renewed within thirty (30) days thereafter; or (e) that certain franchise agreement dated as of September 1, 1939, by and between Lessor and Lessee, relating to the exhibition in the demised premises of motion

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Plaintiffs' Exhibit No. 1—(Continued)

pictures generally released as "Paramount Pictures," to be entered into simultaneously with the execution and delivery of this lease, be cancelled or terminated for any reason whatsoever, then and in any of said events, Lessor may, at its option, give Lessee a written notice stating that by reason thereof the term of this lease shall cease and expire three (3) days from the date of the mailing of same, and upon the mailing of such notice this lease shall cease and expire and be cancelled and terminated and the term hereby demised brought to an end by lapse of time upon the third day thereafter, as fully and completely as if that day were the date in this lease distinctly fixed for the expiration of the demised term, and Lessee hereby agrees to vacate and surrender the demised premises, together with the furnishings, fixtures, personal property and equipment, including, but not by way of limitation, any and all substitutions therefor or replacements therein, by whomsoever made, listed in the inventory referred to in the second paragraph of Article XIV hereof, three (3) days after the mailing of such notice.

Section 2. In the event that said franchise agreement dated as of September 1, 1939, shall hereafter be cancelled and terminated for some reason or cause other than an act of omission by or default or breach thereunder upon the part of Lessee, and this lease be not cancelled and terminated by Lessor, then and in such an event,

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Plaintiffs' Exhibit No. 1—(Continued)

Lessee may, at its option, give Lessor a written notice stating that by reason thereof the term of this lease shall cease and expire three (3) days from the date of the mailing of same, and upon the mailing of such notice this lease shall cease and expire and be cancelled and terminated and the term hereby demised brought to an end by lapse of time upon the third day thereafter, as fully and completely as if that day were the date in this lease distinctly fixed for the expiration of the demised term, and Lessee hereby agrees to vacate and surrender the demised premises, together with the furnishings, fixtures, personal property and equipment, including, but not by way of limitation, any and all substitutions therefor or replacements therein, by whomsoever made, listed in the inventory referred to in the second paragraph of Article XIV hereof, three (3) days after the mailing of such notice.

Section 3. Lessor shall have the right to cancel this lease on August 31, 1944, by giving at least twelve (12) months' prior written notice to Lessee of its intention so to do, and upon the giving of such notice this lease shall cease and expire and be cancelled and terminated and the term hereby demised be brought to an end by lapse of time at the close of business on August 31, 1944, as fully and completely as if that day were the date in this lease distinctly fixed for the expiration of the demised term and Lessee hereby agrees to vacate

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Plaintiffs' Exhibit No. 1—(Continued)

and surrender the demised premises, together with the furnishings, fixtures, personal property and equipment, including, but not by way of limitation any and all substitutions therefor or replacements therein, by whomsoever made, listed in the inventory referred to in the second paragraph of Article XIV hereof, at the close of business on August 31, 1944.

Section 4. Lessor shall have the right to cause the whole or any part of the land and building constituting the demised premises to be sold and disposed of, free from the leasehold estate created by this lease, at any time during the term hereof after August 31, 1941. Lessor agrees that in the event that it shall enter into any bona fide contract of sale of said property free of this lease, it will forthwith send notice to such effect to Lessee and fix in the said notice a date, not less than six (6) months after the date of the notice, on which the term hereof shall cease and determine, and Lessee agrees that promptly on the date so fixed for the termination of this lease it will surrender and yield up the demised premises, together with the furnishings, fixtures, personal property and equipment, including, but not by way of limitation, any and all substitutions therefor or replacements therein, by whomsoever made, listed in the inventory referred to in the second paragraph of Article XIV hereof, and upon the giving of such notice the term of this lease shall automatically cease and

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Plaintiffs' Exhibit No. 1—(Continued)

determine on the date fixed by such notice with the same force and effect as if such date of termination were the date originally limited for the duration of the term hereof. If the demised premises shall be sold or disposed of free of this lease, Lessor agrees that suitable provision shall and will be made in the deed to the purchaser, by a covenant running with the land, restricting the future use of such property by the purchaser and the latter's heirs, successors and assigns to non-theatrical purposes for a period of years equal to the unexpired balance of the original term of this lease.

Article XXX.

Services and Payment Therefor

In connection with the obligation imposed upon Lessee to pay for the water and heat supplied to the demised premises, and the operation and servicing of the theatre air conditioning plant and the mechanical equipment now servicing the theatre located in the boiler room of the building, it is deemed advisable that said water and heat and any power current necessary for the operation of said plant and equipment be purchased by Lessee from Lessor, and that operation and servicing of said plant and equipment be handled by Lessor's employees for Lessee's account, and Lessee pay Lessor for both as hereinafter provided. Accordingly, Lessor agrees to furnish said water and heat (heat during the usual season only), and operate and service said plant and equipment, and Lessee, on

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Plaintiffs' Exhibit No. 1—(Continued)

its part, agrees to pay Lessor therefor the sum of Seven Thousand Four Hundred and Sixty-Four Dollars and Thirty Cents ($7,464.30) during each and every lease year of the demised term, and a pro rata thereof for any part or portion of the demised term comprising less than a full year, increased or decreased, as the case may be, as hereinafter provided, in equal weekly installments, in advance, with each weekly installment of the hereinbefore reserved fixed rent; and in addition thereto, Lessee agrees to pay Lessor, from time to time, as and when Lessor makes demand therefor, the amount of the cost of the supplies necessary for operating said plant and equipment, and the amount of the cost of any and all repairs and replacements required to be made to either or both, and Lessor shall have like remedies for default in payment of any of the herein referred to items as Lessor would have in the event of a default in the payment of any installment of said reserved fixed rent. It is further agreed that said Seven Thousand Four Hundred and Sixty-Four Dollars and Thirty Cents ($7,464.30) item has been determined on the basis of the 1938 calendar year labor and materials costs; that should there be any increase or decrease in said costs, or any of them, said Seven Thousand Four Hundred and Sixty-Four Dollars and Thirty Cents ($7,464.30) item shall be increased or decreased, as the case may be, under an adjustment had at the end of the lease year during which the increase or decrease in question

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Plaintiffs' Exhibit No. 1—(Continued)

occurred, the amount of the adjustment to be determined and fixed in like manner as said Seven Thousand Four Hundred and Sixty-Four Dollars and Thirty Cents ($7,464.30) item was determined and fixed; that when such adjustment is made a cash settlement shall forthwith be made for the amount of the net increase or net decrease in said costs during such preceding lease year, and that the adjusted amount of such item shall thereafter be payable by Lessee to Lessor, subject to further increase or decrease, as the case may be, as hereinabove provided; and that Lessor shall be under no liability whatsoever should it become necessary, at any time, to suspend operation of said plant and/or equipment, and in the event of any such suspension, Lessee shall not be entitled to any damages whatsoever, nor to any abatement in or diminution of the hereinbefore reserved rent and/or said Seven Thousand Four Hundred and Sixty-Four Dollars and Thirty Cents ($7,464.30) item, whether or not the latter be increased or decreased, as aforesaid. Lessor agrees to furnish electric power current required for the operation of said theatre air conditioning plant and mechanical equipment, it being expressly understood that electric power current supplied by Lessor as herein provided shall be paid for separately by Lessee, all in accordance with the provisions of Article IV hereof, such pay-

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Plaintiffs' Exhibit No. 1—(Continued)

ment to be in addition to the payments provided for in this Article XXX.

Notwithstanding any other provisions contained in this lease, it is expressly understood and agreed that if at any time when other means for obtaining the same (directly or through any other person, firm or corporation) are available to Lessee, Lessor shall, in its exclusive discretion, deem it inadvisable to furnish water and heat to the demised premises and to operate and service the theatre air conditioning plant and mechanical equipment now servicing the theatre, Lessor shall have the right, upon not less than thirty (30) days' previous notice in writing to Lessee, to wholly discontinue the furnishing of such water and heat and the operation and servicing of said plant and equipment, and upon the giving of such notice, and the expiration of such period of not less than thirty (30) days, Lessor shall be released and discharged from any further obligation to furnish the water, heat, operation and servicing provided for by this Article XXX and Lessee shall be released and discharged from its obligation to pay Lessor any sums therefor accruing from and after the date of the discontinuance of the furnishing thereof, it being agreed that Lessee thereupon shall have the right to contract or otherwise arrange with any other person, firm or corporation for the further supply of such water and heat and the further operation and servicing of said plant and equipment.

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Plaintiffs' Exhibit No. 1—(Continued)

Article XXXI.

Interpretations

The language in all parts of this lease shall in all cases be construed as a whole and simply according to its fair meaning and not strictly for or against either Lessor or Lessee.

Wherever in this lease any words of obligation or duty regarding either party are used, such words or expressions shall have the same force and effect as though made in the express form of covenants.

Each and all of the terms, covenants, conditions, agreements, obligations, provisions and undertakings of this lease shall inure to the benefit of and shall bind (as the case may be), not only the parties hereto, but each of their respective successors and assigns; and whenever and wherever a reference is made to Lessor or to Lessee, such reference shall be deemed to include the successors and assigns of Lessor or Lessee, as the case may be, provided, however, that nothing contained in this paragraph or provision shall be construed to permit or validate any assignment of any interest of Lessee contrary to the provisions hereinbefore set forth with respect to assignment by Lessee.

No caption of any article of this lease is intended, nor shall the same ever be construed so as to either change, limit, modify or control the text of the particular article to which it relates.

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Plaintiffs' Exhibit No. 1—(Continued)

Article XXXII.

Further Right of Entry, Etc.

Supplementing the provisions of Article VIII hereof, all of the persons enumerated in said Article shall have the further right to enter upon the demised premises at all reasonable hours (a) during the demised term, for the purpose of exhibiting same to prospective purchasers or prospective mortgagees; or (b) during the last six (6) months of the demised term, for the purpose of exhibiting same to persons wishing to rent; or (c) at any time during the demised term, for the purpose of serving or posting and keeping posted thereon, any notice provided for by Section 1192 of the Code of Civil Procedure of the State of California, and any other notice or notices that may at any time be required or permitted by any other law relating to or in anywise affecting the liability of Lessor, or the owner of the fee or any mortgagee or trustee under a deed of trust constituting a lien on the demised premises, for labor performed or materials furnished in and about any alteration and repair of the demised premises, at the instance of any person other than Lessor, or the owner of the fee or such mortgagee or trustee.

In Witness Whereof, Lessor and Lessee have caused their respective corporate seals to be hereunto affixed and this instrument to be executed by their respective corporate officers thereunto duly

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Plaintiffs' Exhibit No. 1—(Continued)

authorized, all as of the day and year first above named.

PARAMOUNT PICTURES, INC.

By /s/ AUSTIN KEOUGH,
Vice-President.

Attest:
[Seal] /s/ NORMAN COLLYER,
Asst. Secretary.

PARTMAR CORPORATION,

By /s/ J. A. PARTINGTON,
President.

Attest:
[Seal] /s/ SAMUEL SHOYAN,
Asst. Secretary.

State of New York,
County of New York—ss.

On this 7th day of Sept., 1939, before me, Anna G. Vidich, a notary public in and for the County of New York, residing therein, duly commissioned and sworn, personally appeared Austin C. Keough, known to me to be a Vice-President, and Norman Collyer, known to me to be an Assistant Secretary, of Paramount Pictures Inc., one of the corporations that executed the within and foregoing instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation herein named, and acknowledged to me that such corporation executed the same.

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Plaintiffs' Exhibit No. 1—(Continued)

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ ANNA G. VIDICH,
Notary Public in and for
Said County and State.

State of New York,
County of New York—ss.

On this 30th day of August, 1939, before me, Garfield Farber, a notary public in and for the County of New York, residing therein, duly commissioned and sworn, personally appeared J. A. Partington, known to me to be the President, and Samuel Shoyan, known to me to be the Asst. Secretary, of Partmar Corporation, one of the corporations that executed the within and foregoing instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation herein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ GARFIELD FARBER,
Notary Public in and for
Said County and State.

Admitted November 14, 1950.

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PLAINTIFFS' EXHIBIT No. 2

This Agreement, made and entered into as of the 1st day of September, 1942, by and between Paramount Pictures, Inc., a corporation organized and existing under the laws of the State of New York and duly qualified to do business in the State of California, party of the first part, hereinafter called "Lessor," and Partmar Corporation, a corporation organized and existing under the laws of the State of California, party of the second part, hereinafter called "Lessee."

Witnesseth:

Whereas by a certain Indenture of Lease, dated as of January 1, 1939, between the parties hereto (the said Indenture of Lease being by this reference thereto made a part of this Agreement as though here fully set forth at length and being hereinafter referred to as the "Lease"), the Lessor leased to the Lessee the theatre portion of the Paramount Theatre Building, Los Angeles, California, together with the equipment therein, for a term commencing on January 1, 1939, and ending on August 31, 1949 (unless sooner terminated as set forth in the Lease), and

Whereas the parties have agreed upon certain amendments of the lease, all as hereinafter set forth.

Now, Therefore, in consideration of the premises and of the mutual covenants hereinafter set forth, the parties hereto hereby covenant and agree as follows:

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Plaintiffs' Exhibit No. 2—(Continued)

1. The paragraph in the Lease reading as follows:

> "To Have and to Hold said premises, with all rights, privileges, easements and appurtenances thereunto belonging or in anywise appertaining, together with the furnishings, fixtures, personal property and equipment now therein contained, unto Lessee, for a term commencing as of the 1st day of January, 1939, and ending on the 31st day of August, 1949, unless said term shall be sooner terminated as hereinafter set forth."

is hereby amended so as to read as follows:

> "To Have and to Hold said premises, with all rights, privileges, easements and appurtenances thereunto belonging or in anywise appertaining, together with the furnishings, fixtures, personal property and equipment now therein contained, unto Lessee, for a term commencing as of the 1st day of January, 1939, and ending on the 18th day of March, 1952, unless said term shall be sooner terminated as hereinafter set forth."

2. Section (b) of Article II of the Lease is hereby amended so as to read as follows:

"(b) For and during each period of twelve (12) calendar months from September 1st to August 31st thereafter and for during the period of the demised term hereof commencing September 1, 1951, and ending on March 18, 1952 (each such period being

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Plaintiffs' Exhibit No. 2—(Continued)

herein sometimes referred to as a 'lease year'), a fixed weekly rental of Two Thousand Two Hundred Dollars ($2,200) for each lease week, payable in advance, on the first day of each and every such week, commencing on September 1st of each lease year, and pro rata of Two Thousand Two Hundred Dollars ($2,200) as the fixed rent for any number of days less than a full week, payable in advance on the first of said days, and should a sum equivalent to the total of:

"(i) fifteen per cent (15%) of the 'gross receipts' during the portion of such lease year that the theatre in the demised premises shall be operated on a 'straight picture policy,' plus

"(ii) twelve and one-half per cent (12½%) of the 'gross receipts' during the portion of such lease year that the theatre in the demised premises shall be operated on a 'stage show policy,' exceed the aggregate amount of the fixed rent payable during such lease year, then, and in such event, an additional sum equivalent to the excess thereof, over and above the aggregate amount of the fixed rent for such lease year, payable on the 15th day immediately following the last day of such lease year."

3. In the sixth paragraph from the end of Article II of the Lease the last sentence thereof reading as follows:

"The remaining audits shall be furnished on

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Plaintiffs' Exhibit No. 2—(Continued)

or before the 15th day of September of each subsequent lease year, commencing on or before September 15, 1940, and each thereof shall respectively cover the immediately preceding twelve (12) month period of time, commencing with September 1st of the preceding calendar year and ending with August 31st of the same calendar year within which such respective audit is to be furnished."

is hereby amended so as to read as follows:

"The remaining audits shall be furnished on or before the 15th day immediately following the end of each lease year, commencing with the lease year ending August 31, 1940, and each such audit shall cover the immediately preceding lease year."

4. Effective September 1, 1942, the following new Article IIa is hereby inserted in the Lease, immediately succeeding the end of Article II of the Lease:

Article IIa

Additional Rent

In addition to the rental provided for in Article II of this lease, the Lessee shall pay to the Lessor as rental commencing September 1, 1942, and continuing during the remainder of the term of this lease (except as hereinafter otherwise provided) fifty per cent (50%) of the "net receipts" (as such

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Plaintiffs' Exhibit No. 2—(Continued)

term is hereafter defined) from the operation of the demised premises, as follows:

For all of the purposes of this Article IIa:

(1) The term "operating expenses" shall be deemed to mean all items of expenses actually and properly incurred or accrued, commencing September 1, 1942, by the Lessee in the operation of the demised premises, including, but not being limited to, the following items:

(a) Film rentals;

(b) Salaries of performers, musicians and stage hands;

(c) Production cost of stage shows, excluding salaries of performers, musicians and stage hands, but including cost of rental of scenery, stage properties and costumes, and salary expense for production, direction and supervision. (It is agreed that the said production cost, as and when and during the time (but only as and when and during the time) that stage shows which are produced, directed and supervised by Fanchon Simon are played in the demised premises, shall be taken at the sum of $1,000 per week (of which sum $300 per week shall be allocated to salary expenses of Fanchon Simon for production, direction and supervision by her) during the two year period commencing September 1, 1942; and during each year thereafter such a sum per week as may be agreed upon between the Lessor and the Lessee in writing,

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Plaintiffs' Exhibit No. 2—(Continued)

or if they cannot so agree, as may be fixed by
tration as hereinafter provided. If stage shows
played in the demised premises for any consecu
period of at least four weeks, Fanchon Simon
be deemed to have produced, directed and su
vised the same even though, due to illness or
porary absence from Los Angeles, she shal
absent from the demised premises and from
performance of her duties in connection with
production, direction and supervision during
more than twenty-five per cent of any such
secutive period. It is further agreed that, as
when and during the time (but only as and
and during the time) that stage shows which
produced, directed and supervised by someone o
than Fanchon Simon are played in the dem
premises, the said production cost shall be t
at a weekly sum during each year (from Septe
1st to September 1st) as may be agreed upon
tween the Lessor and the Lessee in writing,
they cannot so agree, as may be fixed by arbitra
as hereinafter provided. Any said arbitration
be conducted in Los Angeles as follows: The Le
or the Lessee may by notice served on the o
appoint one arbitrator and call upon the othe
appoint a second arbitrator within five days a
the receipt of such notice; and each party ag
that on receiving any such notice it will so app
an arbitrator. The two arbitrators thus appoi
shall, within five days after the appointment of
one last appointed jointly appoint a third arbi

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Plaintiffs' Exhibit No. 2—(Continued)

tor. The decision of a majority of the two arbitrators, rendered in writing, shall be final, conclusive and binding upon the Lessor and the Lessee. The Lessor and the Lessee shall each bear one-half of the compensation and expenses of the arbitrators);

(d) Salaries of all persons actually employed in the said theatre, such as manager, booker (while, but only while, stage shows are played in the demised premises), assistant manager, cashiers, doormen, engineers, ushers, cleaners, projection and soundmen, etc., but not including salaries paid to any person for production and direction of stage shows. (For the purposes hereof, unless the Lessor shall otherwise agree in writing, the manager's salary shall not be in excess of $150.00 per week, the booker's salary (which shall be payable only while stage shows are played in the demised premises) shall not be in excess of $140.00 per week, and no other employee, other than union labor, shall be paid a salary in excess of $60.00 per week);

(e) Cost of newspaper and other advertising. (The Lessor and the Lessee shall agree on the top limit of the advertising expense during each year, commencing with the year beginning September 1, 1942. If they cannot so agree upon such top limit for any such year, the same shall be fixed by arbitration in the manner set forth in paragraph (c) above);

(f) Telegraph, telephone and postage expended in the actual conduct and operation of the demised

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Plaintiffs' Exhibit No. 2—(Continued)

premises by the Lessee; cost of uniforms and cleaning; cost of forms.

(g) Service fees on signs, sound and other equipment. (For the period from September 1, 1942, through November 30, 1944, these service fees shall include, but not be limited to, the sum of $1,200 per year, being the amount for such period hereby allocated to maintenance expense under that certain agreement, dated November 29, 1939, between Fanchon & Marco, Inc., and Electrical Products Corporation (which agreement relates to vertical and marquee displays on the demised premises), and this regardless of the fact that such maintenance expense may have been capitalized on the books of the Lessee;

(h) Fees payable to the American Society of Composers, Authors and Publishers, and like organizations; license fees and inspection fees payable to any governmental subdivision; social security taxes; occupation taxes; personal property taxes; parking fee expense; donations to charities (which donations, for the purposes hereof, shall not, unless the Lessor shall otherwise agree in writing, be in the aggregate in excess of $250 per year);

(i) Cost of electricity, fuel, heat, steam, refrigeration and gas;

(j) Premiums on policies of public liability, elevator, boiler or explosion, safe, burglary, hold-up,

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Plaintiffs' Exhibit No. 2—(Continued)

and workmen's compensation, insurance, and fidelity bonds; premiums on fire insurance policies covering equipment;

(k) Cost of minor replacements and repairs charged to current expense;

(l) Cost of annual audit by a firm of certified public accountants, and the cost of any "third audit" requested by the Lessor as hereinafter provided for.

(m) Five per cent of the "gross receipts" (as such term is defined in Article II hereof and which definition shall apply whenever such term is hereinafter used) to cover all of the expenses of the Lessee in connection with the keeping of the books, accounts and records, general office overhead, buying and booking of pictures, and management generally;

(n) Rental is provided for in Section (b) of Article II of this lease:

(o) Depreciation or amortization as follows, applicable to the improvements which the Lessee has made in the demised premises through August 31, 1942:

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Plaintiffs' Exhibit No. 2—(Continued)

Year Commencing Sept. 1 and Ending August 31	Amount to Be Depreciated or Amortized in Such Year
1942-3	$10175.33
1943-4	10175.33
1944-5	9958.81
1945-6	9850.56
1946-7	9709.42
1947-8	8764.01
1948-9	8291.24

(p) Depreciation or amortization on the cost to the Lessee of alterations, repairs or replacements (excluding minor repairs and replacements charged to current expense) made by the Lessee in the demised premises on and after September 1, 1942 (provided the same are made in accordance with the applicable provisions of this lease), at the usual rates in accordance with sound accounting practice.

Any rebates, allowances or refunds allowed or obtained by the Lessee on any item of operating expense will be applied to and deducted from "operating expenses" so as to reduce the same by the amount thereof.

The expression "operating expenses" shall not be deemed to include any interest, or (except as above specified) any depreciation, amortization, home office or district office overhead, management or officer's salaries, insurance, alterations, repairs or replacements, or taxes of any nature.

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Plaintiffs' Exhibit No. 2—(Continued)

(2) The term "net receipts" shall be deemed to mean the excess, commencing September 1, 1942, of the "gross receipts" over the "operating expenses."

(3) The term "net losses" shall be deemed to mean the excess, commencing September 1, 1942, of the "operating expenses" over the "gross receipts."

On or before the twentieth day after the end of each month (commencing with the month of September, 1942) the Lessee shall cause to be prepared and shall deliver to the Lessor an operating statement for such month, such operating statement to show the "gross receipts" and the "operating expenses" for such month. If such operating statement shows "net receipts" for such period the Lessee shall, concurrently with the delivery of such statement to the Lessor, pay as rent one-half of the amount of such "net receipts" to the Lessor.

For each lease year (as the term "lease year" is defined in Section (b) of Article II of this lease and in which sense, except as hereinafter expressly provided, such term is hereinafter used in this Article IIa) the Lessee, as promptly as possible after, and in any event not later than sixty days after the end of each year, shall cause an independent audit to be made by a firm of certified accountants acceptable to the Lessor, covering the lease year in question, and a certified copy thereof to be delivered to the Lessee. (Upon the termination

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Plaintiffs' Exhibit No. 2—(Continued)

of this lease otherwise than by lapse of time, or upon the exercise by the Lessor of its option hereinafter in this Article IIa provided, such audit shall be so made and delivered for the period from the commencement of the then current lease year to and including the said termination date of this lease or the effective date set forth in the notice from the Lessor exercising its said option, and such applicable period shall be deemed to constitute the then current lease year.) Each such audit shall be with respect to the items set forth, or which should have been set forth, in the monthly operating statements of the Lessee during the lease year covered thereby. Unless Lessor, within sixty days after the receipt of any such audit, shall serve a notice on the Lessee that it is dissatisfied with such audit, the same shall be final and binding upon the Lessor and the Lessee, and they shall make final adjustment and settlement each with the other, as provided for in this Article IIa, for the lease year covered by such audit, in accordance with such audit. If Lessor shall serve such notice on the Lessee within the time limit aforesaid, Lessor shall have the right to make a second audit at its own expense, and if Lessor and Lessee be then unable to compose and adjust their differences within a reasonable time after the second audit shall have been completed, a third audit shall be made by Price Waterhouse & Co., or (if the Lessor does not wish Price Waterhouse & Co.) by some other firm of certified public accountants selected by the

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Plaintiffs' Exhibit No. 2—(Continued)

Lessor and acceptable to the Lessee, the expense of which third audit shall be divided between the Lessor and the Lessee, and which third audit shall be final and binding upon the Lessor and the Lessee, who shall make final adjustment and settlement each with the other, as provided for in this Article IIa, for the lease year in question, in accordance with such audit. All payments due from the Lessee to the Lessor under the provisions of this paragraph shall be considered as being owing as rent hereunder.

The Lessee shall furnish to the Lessor as soon as possible after the close of each week (commencing with the week ending September 8, 1942), and in any event not later than five days thereafter, a detailed statement of the "gross receipts" and "operating expenses" during such week. The Lessee shall also furnish the Lessor with a daily statement of the "gross receipts" for the preceding day.

The Lessee agrees that it will keep in St. Louis, Mo., or, if the Lessor so requests, in Los Angeles, Cal., accurate books of account, vouchers and other records showing all items of "gross receipts" and "operating expenses," and that the Lessor, or its representatives, shall have the right during usual business hours to inspect, make copies of, examine and audit the said books of account, vouchers and other records. The Lessee agrees that, if at any time or from time to time the Lessor so requests, the Lessor shall have the right to appoint a representative to act with the Lessee in the keeping of the

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Plaintiffs' Exhibit No. 2—(Continued)

said books of account, vouchers, and other records, one-half of whose salary (which shall not be in excess of $75.00 per week) shall be paid by the Lessee and which amount so paid by the Lessee shall be considered as an item of "operating expenses."

The parties hereto intend and agree that one-half of the "net losses," if any, from time to time incurred shall be applied against, and reduce accordingly, both one-half of the "net receipts" and the rental provided for in Article II of this lease, whether theretofore paid by the Lessee to the Lessor or whether to accrue and to be paid by the Lessee to the Lessor, as follows: If any operating statement above provided for shows "net losses" for the month covered thereby, the Lessee shall deduct one-half of the amount of such "net losses" from the next accruing fixed weekly rentals and percentage rental provided for in Article II of this lease and/or from the next accruing amounts of "net receipts" due the Lessor as shown by subsequent operation statements rendered the Lessor as provided for in this Article IIa. If at the end of any lease year the Lessee has not been so reimbursed for one-half of the "net losses" incurred in such year, then the Lessor shall pay to the Lessee the balance of the one-half of such "net losses" not so reimbursed to the Lessee but in no event shall the amount so to be paid to the Lessee exceed the net amount of the rental payments theretofore received by the Lessor under this lease (viz, all

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Plaintiffs' Exhibit No. 2—(Continued)

payments made by the Lessee to the Lessor under the provisions of Article II and this Article IIa through the end of such lease year, less all sums theretofore paid by the Lessor to the Lessee by way of reimbursement for all previous lease years); and if the Lessee is not thus reimbursed in full for the one-half of the "net losses" incurred in such lease year, then the Lessee shall deduct the remaining balance (as to which it still has not been reimbursed) of the one-half of such "net losses" from the fixed weekly rentals and percentage rental provided for in Article II of this lease next accruing after the end of such lease and/or from the next accruing amounts of "net receipts" due the Lessor as shown by the operating statements subsequent to the end of such lease year rendered the Lessor as provided for in this Article IIa.

In the event that during the term of this lease the demised premises shall be damaged by fire, earthquake or other catastrophe and in the event that the Lessor does not thereupon terminate this lease as provided for in Article XII hereof, then, during the period (but only during the period) while the Lessor is making repairs and until the resumption of public performances in the demised premises, the rights and obligations of the Lessor and the Lessee respectively hereinbefore set forth in this Article IIa shall be suspended and be of no force or effect.

In the event that during the term of this lease the theatre constituting the demised premises should

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Plaintiffs' Exhibit No. 2—(Continued)

be closed by reason of epidemic, strikes, or the making of repairs or alterations as provided for in this lease, then, while (but only while) the said theatre is so closed, the rights and obligations of the Lessor and the Lessee respectively hereinbefore set forth in this Article IIa shall be suspended and be of no force or effect.

The expression "Accumulated Net Loss" at any particular time (which shall always be the close of the last day of a month) during the term of this lease shall mean (a) the "net losses" from the beginning of any lease year during the term of this lease through the end of any particular month in such lease year (such lease year being hereinafter referred to as the "particular year"), plus (b) the "net losses" for each prior lease year during that part of the term of this lease commencing September 1, 1942, except that, if with respect to any such prior lease year, there should be "net receipts" for any lease year or years subsequent thereto (but prior to the "particular year"), such "net receipts" shall be applied against and reduce pro tanto or eliminate the said "net losses" for such prior lease year. By way of illustration:

(i) If, in the lease year commencing September 1, 1942, for the period from the commencement of such year through June 30, 1943, the "net losses" amount to $25,000, then the "Accumulated Net Loss" on June 30, 1943, will be $25,000.

(ii) If, in the lease year commencing Septem-

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Plaintiffs' Exhibit No. 2—(Continued)

ber 1, 1943, for the period from the commencement of such year through April 30, 1944, the "net losses" amount to $65,000,

And if for the lease year ending August 31, 1943, the "net losses" amounted to $35,000, then the "Accumulated Net Loss" on April 30, 1944, will be $100,000;

Or, if for the lease year ending August 31, 1943, the "net receipts" amounted to $25,000, then the "Accumulated Net Loss" on April 30, 1944, would be $65,000.

(iii) If, for the lease year ending August 31, 1945, the "net losses" amount to $50,000,

And if for the lease year ending August 31, 1943, the "net receipts" amounted to $15,000, and if for the lease year ending August 31, 1944, the "net losses" amounted to $40,000, then the "Accumulated Net Loss" on August 31, 1945, would be $90,000;

Or, if for the lease year ending August 31, 1943, the "net losses" amounted to $15,000, and if for the lease year ending August 31, 1944, the "net receipts" amounted to $40,000, then the "Accumulated Net Loss" on August 31, 1945, would be $50,000;

Or, if for the lease year ending August 31, 1943, the "net losses" amounted to $40,000, and if for the lease year ending August 31, 1944, the "net receipts" amounted to $15,000, then

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Plaintiffs' Exhibit No. 2—(Continued)

the "Accumulated Net Loss" on August 31, 1945, would be $75,000.

(iv) If for the lease year ending August 31, 1946, the "net losses" amount to $40,000,

And if for the lease year ending August 31, 1943, the "net receipts" amounted to $15,000, and if for the lease year ending August 31, 1944, the "net losses" amounted to $40,000, and if for the lease year ending August 31, 1945, the "net losses" amounted to $20,000 then the "Accumulated Net Loss" on August 31, 1946, would be $100,000;

Or, if for the lease year ending August 31, 1943, the "net losses" amounted to $15,000, and if for the lease year ending August 31, 1944, the "net receipts" amounted to $40,000, and if for the lease year ending August 31, 1945, the "net losses" amounted to $50,000, then the "Accumulated Net Loss" on August 31, 1946, would be $90,000;

Or, if for the lease year ending August 31, 1943, the "net losses" amounted to $15,000, and if for the lease year ending August 31, 1944, the "net receipts" amounted to $40,000, and if for the lease year ending August 31, 1945, the "net receipts" amounted to $40,000, then the "Accumulated Net Loss" on August 31, 1946, would be $40,000;

Or, if for the lease year ending August 31, 1943, the "net losses" amounted to $20,000, and

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Plaintiffs' Exhibit No. 2—(Continued)

if for the lease year ending August 31, 1944, the "net losses" amounted to $25,000, and if for the lease year ending August 31, 1945, the "net receipts" amounted to $40,000, then the "Accumulated Net Loss" on August 31, 1946, would be $45,000.

In the event that the "Accumulated Net Loss" at the close of the last day of any month during the term of this lease shall be in the amount of Two Hundred Thousand Dollars ($200,000) or more, then the Lessor shall have the right, by notice given to the Lessee not later than the sixtieth day following the last day of such month, to elect that, commencing on the first day of the month next succeeding the month in which such notice was given, this Article IIa shall be of no further force or effect and shall be considered as eliminated from this lease, and upon the service of such notice then, commencing on the first day of the month next succeeding the month in which such notice was given, this Article IIa shall cease to be of any further force or effect and shall be considered as eliminated from this lease and neither of the parties hereto shall, except as hereinafter in this Article IIa specifically provided, have any rights and obligations against or to the other with respect to any of the provisions set forth in this Article IIa, it being, however, agreed that all of the terms and provisions of this lease (except as set forth in this Article IIa) shall remain in full force and effect.

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Plaintiffs' Exhibit No. 2—(Continued)

If such notice is given, the parties hereto shall make all payments one to the other, in accordance with the provisions hereinbefore set forth in this Article IIa, for the period ending with the close of business on the last day of the month in which such notice was given.

5. In Section (c) of Article III and in Sections 1 and 2 of Article XXIX of the Lease reference is made to the franchise agreement, dated as of September 1, 1939, by and between the Lessor and the Lessee. All such references shall hereafter apply to the said franchise agreement, dated as of September 1, 1939, as amended by the agreement relating thereto, dated as of September 1, 1942, between the Lessor and the Lessee.

6. Under date of July 23, 1941, the memorandum referred to in Section 2 of Article VI of the Lease was entered into between the parties hereto, and the same is hereby in all respects approved.

The last sentence in the said Section 2 of Article VI of the Lease is hereby amended so as to read as follows:

> "Lessor hereby agrees that in the event it shall hereafter exercise its right to terminate this lease prior to August 31, 1949, in accordance with the provisions of clause (e) of Section 1 of Article XXIX hereof if such right shall be exercised solely by reason of a cancellation and termination of the franchise agreement dated as of September 1, 1939, as amended

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Plaintiffs' Exhibit No. 2—(Continued)

by the agreement dated as of September 1, 1942, therein referred to for some reason or cause other than an act of omission by or default or breach thereunder on the part of Lessee, or in accordance with the provisions set forth in Section 4 of Article XXIX hereof, or in the event that Lessee prior to August 31, 1949, shall exercise its right to terminate this lease in accordance with the provisions of Section 2 of Article XXIX hereof, Lessor shall pay over to Lessee upon the date of such termination a sum equal to the then unamortized total amount of the net cost incurred by the Lessee in connection with all of said improvements as certified in the memorandum between the parties hereto under date of July 23, 1941."

7. Section 3 of Article XXIX of the Lease is hereby deleted and stricken out.

8. Concurrently with the execution and delivery of this agreement, the Lessor has loaned to the Lessee the sum of Twenty-eight Thousand Dollars ($28,000), and the Lessee has executed and delivered to the Lessor its certain promissory note, dated September 1, 1942, to the order of the Lessor in such principal sum, and bearing interest at the rate of two (2) per cent per annum from September 1, 1942, and which promissory note shall be regarded as though the same were here fully set forth at length.

The Lessee covenants and agrees that, if the

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Plaintiffs' Exhibit No. 2—(Continued)

Lessee shall fail to make when due any payment of the principal of or interest under the said note, the entire unpaid balance of principal thereof, together with all unpaid accrued interest thereunder, may, at the option of the Lessor, be added to any subsequent instalment of the fixed rent due and payable as provided for in Article II of the Lease, and the Lessor shall have like remedies for default in payment thereof as the Lessor would have in the event of a default in the payment of any instalment of such fixed rent.

The Lease is hereby amended in accordance with the provisions of this Section 8.

9. The Lease, amended as hereinabove in this agreement provided, is hereby ratified, approved and confirmed.

In Witness Whereof, Lessor and Lessee have caused their respective corporate seals to be hereunto affixed and this instrument to be executed by their respective corporate officers thereunto duly authorized, this 18th day of January, 1943, as of the day and year first above written.

PARAMOUNT
PICTURES, INC.,
By /s/ LEONARD H. GOLDENSON,
Vice-President.

Attest:
[Seal] /s/ NORMAN COLLYER,
Asst. Secretary.

PARTMAR CORPORATION,

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Plaintiffs' Exhibit No. 2—(Continued)

By /s/ MARCO WOLFF,
Vice-President.

Attest:

[Seal] /s/ HARRY WALLEN,
Asst. Secretary.

State of New York,
County of New York—ss.

On this 18 day of January, 1943, before me, Anna G. Vidich, a notary public in and for the County of New York, residing therein, duly commissioned and sworn, personally appeared Leonard H. Goldenson, known to me to be a Vice-President, and Norman Collyer, known to me to be an Assistant Seceretary, of Paramount Pictures, Inc., one of the corporations that executed the within and foregoing instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation herein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ ANNA G. VIDICH,
Notary Public in and for
Said County and State.

State of California,
County of Los Angeles—ss.

On this 8 day of Feb., 1943, before me, P. P. Burch, a notary public in and for the County of

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Plaintiffs' Exhibit No. 2—(Continued)

Los Angeles, residing therein, duly commissioned and sworn, personally appeared Marco Wolff, known to me to be the Vice-President, and Harry Wallen, known to me to be the Asst. Secretary, of Partmar Corporation, one of the corporations that executed the within and foregoing instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation herein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ P. P. BURCH,
Notary Public in and for
Said County and State.

My Commission expires July 12, 1945.

Admitted November 14, 1950.

PLAINTIFFS' EXHIBIT No. 3

Agreement made and entered into this 30th day of August, 1939, as of the 1st day of September, 1939, by and between Paramount Pictures, Inc., a New York corporation, party of the first part, (hereinafter referred to as "Paramount") and Partmar Corporation, a California corporation, party of the second part, (hereinafter referred to as the "Exhibitor").

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Plaintiffs' Exhibit No. 3—(Continued)

Witnesseth:

First: (a) Paramount hereby grants to the Exhibitor upon the terms and conditions hereinafter specified, a license under the respective copyrights of the sound photoplays licensed hereunder to exhibit at the Paramount Theatre, Los Angeles, California, the feature photoplays (to be selected as hereinafter provided), short subject photoplays and each issue of two editions of Paramount Sound News (except any and all photoplays excepted and excluded from this license and agreement pursuant to Article Second hereof) which shall be generally released by Paramount Pictures Inc., its successors or assigns, as "Paramount Pictures" or under the trade-mark "Paramount," or by any parent, subsidiary or affiliated company thereof now or hereafter formed to distribute or having the distribution rights of motion pictures generally released as "Paramount Pictures" under the trade-mark "Paramount" for exhibition at motion picture theatres in the United States during the period of ten (10) years commencing September 1, 1939, and ending August 31, 1949, (all of which photoplays are hereinafter referred to as "released by Paramount"), and hereby also grants a license (conditioned as hereinafter stated under the respective copyrights of any matter included in the sound recorded for any of said photoplays) to reproduce for public performance at said theatre such recorded sound in synchronism with the exhibition of such

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Plaintiffs' Exhibit No. 3—(Continued)

photoplays. The Exhibitor hereby accepts such license and agrees to comply with all of the terms and conditions thereof. It is agreed that any and all photoplays which may be pre-released or road-shown by or with the authority of Paramount or any parent, subsidiary or affiliated company thereof, shall not be deemed available for exhibition hereunder unless and until generally released for exhibition as aforesaid during the aforesaid ten (10) year period.

(b) For all purposes of this agreement each and every photoplay of the length of five thousand (5,000) feet or more released by Paramount as aforesaid during such ten (10) year period shall be deemed a feature photoplay, and each and every photoplay which shall not exceed approximately twenty-two hundred (2200) feet in length shall be deemed a short subject photoplay. It is agreed that this license shall not cover or apply to any and all photoplays the length of which shall exceed approximately twenty-two hundred (2200) feet and which shall be less than approximately five thousand (5,000) feet, except, however, that the Exhibitor may at its election exhibit such photoplays hereunder upon terms and conditions applicable to the feature photoplays licensed hereunder.

(c) For all purposes of this agreement each release year shall be deemed to commence on September 1st and end on August 31st of the next succeeding year unless Paramount shall during the

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Plaintiffs' Exhibit No. 3—(Continued)

ten (10) year period referred to in subdivision (a) of this Article First change the release year, in which event the release year shall, for the purposes of this agreement, be that which Paramount shall generally fix as a release year for the distribution of photoplays in the United States.

(d) For all purposes of this agreement the feature photoplays and short subject photoplays released by Paramount during the year beginning September 1, 1939, and ending August 31, 1940, shall be known and are referred to herein as "Group S-11 feature photoplays" and "Group S-11 short subject photoplays," respectively; and the feature photoplays and short subject photoplays released by Paramount in each successive release year of the balance of the ten (10) year period of this agreement shall be known and are referred to herein in like manner as "Group S-12" to "Group S-20," both inclusive, respectively.

Second: (a) It is agreed that there shall be excepted and excluded from this license agreement even though generally released for distribution during the aforesaid ten (10) year period all feature and short subject photoplays as to which Paramount is and/or shall be under contract with the producer of such photoplays or with any other party to obtain the consent or approval of such producer or other party to the terms and conditions of the licensing and/or exhibition thereof, unless Paramount obtains such consent or approval for

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Plaintiffs' Exhibit No. 3—(Continued)

the exhibition of such photoplays hereunder, which consent or approval Paramount agrees to use its best efforts to obtain.

(b) Paramount may exhibit and/or license the exhibition of any and all photoplays excepted and excluded from this license and agreement when and where desired by it and no rights whatsoever are granted hereunder to the Exhibitor as respects all photoplays so excepted and excluded.

Third: (a) The license to reproduce recorded sound is granted upon the Exhibitor's express warranty and upon condition: (1) that the sound reproducing equipment in said theatres will operate reliably and efficiently to reproduce such recorded sound with adequate volume and high quality, whether recorded upon a print or upon records, discs or other similar devices; (2) if copyrighted musical compositions are included in such recorded sound, the Exhibitor now has or will have at the date or dates of the exhibition of each photoplay and the reproduction of the recorded sound therefor, an effective license from the copyright proprietor or from any licensee of the copyright proprietor to perform publicly the said copyrighted musical compositions.

(b) Paramount reserves the right to record the sound for reproduction in synchronism with the exhibition of such photoplays or any of them on the print thereof or on records, discs, or any other

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Plaintiffs' Exhibit No. 3—(Continued)

device, as Paramount may from time to time determine.

(c) All references hereinafter made to a print shall be deemed to include the records, discs and any other device upon which sound is recorded for reproduction in synchronism with the exhibition of a print.

Fourth: For the purpose of determining and computing the license fees to be paid by the Exhibitor for the license to exhibit the feature photoplays licensed hereunder released during each year of the aforesaid ten (10) year period and for all other purposes hereunder Paramount shall have the right (irrespective of the number of feature photoplays released by Paramount in each of such years and regardless of the classification thereof made by Paramount under any other agreement for any other theatre or theatres other than the theatre licensed hereunder) to classify from time to time the feature photoplays licensed for exhibition hereunder during each year of the said ten (10) year period.

Fifth: (a) The Exhibitor agrees to exhibit at the Paramount Theatre during each year of the ten (10) year period of this agreement such number of feature photoplays licensed hereunder as shall be necessary to consume not less than forty-six (46) weeks of playing time at the Paramount Theatre during each such year and to pay the license fees

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Plaintiffs' Exhibit No. 3—(Continued)

for not less than such number of feature photoplays.

(b) If during the remaining six (6) weeks of any yearly period of the term of this agreement the Exhibitor shall not exhibit any feature photoplays licensed hereunder, and shall exhibit feature photoplays not released by or through Paramount, then and in such event the Exhibitor agrees to pay to Paramount for each such week the sum of One Thousand Fifty Dollars ($1,050.00) on the first business day of each such week. The Exhibitor agrees that it will not exhibit such other feature photoplays not licensed hereunder for more than two (2) consecutive weeks during any month of any yearly period hereof.

(c) The Exhibitor agrees to exhibit each feature photoplay, short subject photoplay and newsreel licensed for exhibition hereunder for an exhibition period of not less than one (1) week, except that the Class A feature photoplay shall be exhibited for an exhibition period of not less than three (3) consecutive weeks. For the purposes of this agreement, a week shall be deemed to be seven (7) consecutive days as long as Sunday exhibitions are lawfully permitted, and if Sunday exhibitions are not lawfully permitted, a week shall be deemed to be six (6) consecutive days, except for any Sunday which may intervene. The Exhibitor shall have the right to exhibit any feature photoplay licensed hereunder for an additional period immediately following the

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Plaintiffs' Exhibit No. 3—(Continued)

first week's exhibition thereof, and such additional exhibition period shall commence on the morning immediately following the last evening's performance of the first week's exhibition.

(d) The license herein granted for the number of days exhibition provided for in this Article Fifth shall not be deemed to include the right of exhibition at any time during the respective exhibition periods prior to 6:00 a.m. nor after 1:00 a.m. following the midnight of the last date of exhibition herein provided for unless an express license therefor is granted by Paramount to the Exhibitor in writing, or any right of exhibition at any time other than on the respective date or dates of exhibition selected, designated or otherwise agreed upon as provided herein and confirmed in writing by Paramount, or any right of exhibition other than by means of a print or any such motion picture furnished to the Exhibitor by Paramount for the express purpose of exhibition hereunder in the Paramount Theatre as herein provided and confirmed in writing by Paramount.

Sixth: (a) The term "stage show," as used herein, shall mean the performance upon the stage of the Paramount Theatre by living persons of vaudeville, dramatic, operatic, orchestral, instrumental, vocal, or other similar forms of entertainment which shall require not less than thirty (30) consecutive minutes in the aggregate for presentation at each performance and for which stage show the Exhibitor shall actually expend a bona fide sum

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Plaintiffs' Exhibit No. 3—(Continued)

of not less than Four Thousand Five Hundred Dollars ($4,500.00) per week for performers, stage hands, orchestra and other expenses necessarily and directly incurred only in connection with such stage show, expressly excluding the cost of any advertising.

It is agreed and made the essence of this agreement that the stage shows to be presented by the Exhibitor at the Paramount Theatre shall be first class deluxe "Fanchon & Marco Stage Shows" or other deluxe stage show presentations of the highest class, suitable and desirable for presentation in a first-run motion picture theatre of the highest class in the United States.

(b) The term "stage show policy," as used herein, shall mean the operation of the Paramount Theatre with a program consisting of the presentation of stage shows as defined and described in subdivision (a) of this Article Sixth, together with the exhibition of feature photoplays licensed hereunder on the same program.

(c) The term "straight picture policy," as used herein, shall mean the operation of the Paramount Theatre with a program

(1) consisting exclusively of the exhibition of motion pictures licensed hereunder without stage shows; or

(2) consisting of the exhibition of motion pictures licensed hereunder in conjunction with

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Plaintiffs' Exhibit No. 3—(Continued)

other theatrical exhibition or form of entertainment performed by living persons on the stage, the cost of which shall be less than Four Thousand Five Hundred Dollars ($4,500.00) per week or which shall require less than thirty (30) consecutive minutes in the aggregate for presentation at each performance.

Seventh: The terms and conditions upon which the feature photoplays, released during the first year of the aforesaid ten (10) year period hereof, are licensed for exhibition hereunder during the operation of the Paramount Theatre on a stage show policy, shall be as follows:

(A) The feature photoplays released by Paramount during the first year of the ten (10) year period of this agreement shall be classified as follows, and Paramount shall have the right to designate the motion pictures licensed hereunder during such first year period to such classifications regardless of the classification made by Paramount under any other agreement:

One (1) Class A feature photoplay to be designated by Paramount;

Twenty (20) Class B feature photoplays to be designated by Paramount;

Sixteen (16) Class C feature photoplays to be designated by Paramount;

The remaining feature photoplays to be known as Class D feature photoplays, to be designated by Paramount.

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Plaintiffs' Exhibit No. 3—(Continued)

(B) The Exhibitor agrees to pay to Paramount as license fees for the license to exhibit the feature photoplays licensed hereunder released during the first year of the aforesaid ten (10) year period, the following sums:

(1) For the license to exhibit such Class A feature photoplay the Exhibitor agrees to pay to Paramount as license fees:

(a) For the first week's exhibition thereof a sum equal to thirty per cent (30%) of the gross receipts of the Paramount Theatre during such first week's exhibition period thereof until such gross receipts shall reach the sum of Twenty Thousand Dollars ($20,000.00), and a sum equal to fifty per cent (50%) of such gross receipts in excess of Twenty Thousand Dollars ($20,000.00); and

(b) For the second week's exhibition thereof a sum equal to twenty-five per cent (25%) of the gross receipts of the Paramount Theatre during such second week's exhibition period thereof until such gross receipts shall reach the sum of Seventeen Thousand Dollars ($17,000.00), and a sum equal to fifty per cent (50%) of such gross receipts in excess of Seventeen Thousand Dollars ($17,000.00); and

(c) For the third week's exhibition thereof a sum equal to twenty-five per cent (25%) of the gross receipts of the Paramount Theatre during such third week's exhibition period thereof until

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Plaintiffs' Exhibit No. 3—(Continued)

such gross receipts shall reach the sum of Seventeen Thousand Dollars ($17,000.00), and a sum equal to fifty per cent (50%) of such gross receipts in excess of Seventeen Thousand Dollars ($17,000.00). Provided, however, that if the third week's gross receipts of the Paramount Theatre shall be less than the sum of Eighteen Thousand Dollars ($18,000.00) before deducting the cost of the stage show, as hereinafter provided, then and in such event the Exhibitor agrees to pay to Paramount in lieu of the license fees provided for hereinabove for the third week's exhibition, a sum equal to fifteen per cent (15%) of such third week's gross receipts without deduction being made from such gross receipts for the cost of the stage show.

In computing the license fee payable for each week's exhibition of the said Class A feature photoplay, the Exhibitor shall be entitled to first deduct from the weekly gross receipts the cost of the stage show (which cost shall be the minimum sum provided for in sub-division (a) of Article Sixth hereof), except however, that in no event shall the amount of such deduction exceed the sum of Forty-Five Hundred Dollars ($4,500.00) for any week notwithstanding that the actual cost of the stage show for such week may be in excess thereof.

(2) For the license to exhibit each such Class B feature photoplay the Exhibitor agrees to pay to Paramount a sum equal to twenty-five per cent (25%) of the weekly gross receipts of the theatre

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Plaintiffs' Exhibit No. 3—(Continued)

during the exhibition period thereof until such gross receipts shall reach the sum of Seventeen Thousand Dollars ($17,000.00), and a sum equal to fifty per cent (50%) of such weekly gross receipts in excess of Seventeen Thousand Dollars ($17,000.00); except however, that in computing the license fees payable for each such feature photoplay the Exhibitor shall be entitled to first deduct from the weekly gross receipts the cost of the stage show (which cost shall be the minimum sum provided for in sub-division (a) of Article Sixth hereof), the amount of such deduction during any week to be not more than Forty-five Hundred Dollars ($4500.00) notwithstanding that the actual cost of such stage show for such week may be in excess thereof.

Provided however, only with respect to four (4) Class B feature photoplays which Paramount shall designate, if the weekly gross receipts of the theatre during the exhibition of any such four (4) Class B feature photoplays shall be less than the sum of Eighteen Thousand Dollars ($18,000.00) before deducting the cost of the stage show, then and in such event the license fee payable in respect of such Class B feature photoplay shall revert to and the Exhibitor shall pay in lieu of the license fees provided hereinabove a sum equal to fifteen per cent (15%) of such weekly gross receipts during such week when such gross receipts shall be less than Eighteen Thousand Dollars ($18,000.00). In computing such reduced license fees no deduction

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Plaintiffs' Exhibit No. 3—(Continued)

shall be made from the gross receipts for the cost of the stage show.

(3) For the license to exhibit each such Class C feature photoplay, the Exhibitor agrees to pay to Paramount as license fees a sum equal to fifteen per cent (15%) of the weekly gross receipts of the Paramount Theatre during the exhibition thereof until such gross receipts shall reach the sum of Twenty-One Thousand Five Hundred Dollars ($21,500.00) and a sum equal to fifty per cent (50%) of such weekly gross receipts in excess of Twenty-One Thousand Five Hundred Dollars ($21,500.00). No deduction shall be made for the cost of the stage show in computing the license fees payable for such Class C feature photoplays.

(4) For the license to exhibit each such Class D feature photoplay the Exhibitor agrees to pay to Paramount as license fees the sum of One Thousand Fifty Dollars ($1,050.00) per photoplay.

Eighth: The terms and conditions upon which the feature photoplays released during the first year of the ten (10) year term hereof are licensed for exhibition during the operation of the Paramount Theatre on a straight picture policy shall be as follows:

(A) The feature photoplays released by Paramount during the first year of the ten (10) year period of this agreement shall be classified as follows, and Paramount shall have the right to designate the motion pictures licensed hereunder during

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Plaintiffs' Exhibit No. 3—(Continued)

such first year period to such classifications regardless of the classification made by Paramount under any other agreement:

One (1) Class A feature photoplay to be designated by Paramount;

Five (5) Class B feature photoplays to be designated by Paramount;

Twelve (12) Class C feature photoplays to be designated by Paramount;

Twelve (12) Class D feature photoplays to be designated by Paramount;

The remaining feature photoplays to be known as Class E, to be designated by Paramount.

(B) The Exhibitor agrees to pay to Paramount as license fees for the license to exhibit the feature photoplays licensed hereunder released during the first year of the aforesaid ten (10) year period, the following sums:

(1) For the license to exhibit such Class A feature photoplay, the Exhibitor agrees to pay to Paramount as a minimum license fee a sum equal to thirty-five per cent (35%) of the gross receipts of the Paramount Theatre during the exhibition period thereof until said gross receipts shall reach a split figure which will allow the Exhibitor to reimburse itself out of such gross receipts for its "operating expenses," as the term is hereinafter defined, and for the minimum license fee so paid and will allow to the Exhibitor a further sum out of such gross receipts equal to fifty per cent (50%)

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of such minimum license fee so paid; and the Exhibitor agrees to pay to Paramount, in addition to such minimum license fee a sum equal to fifty per cent (50%) of such gross receipts in excess of such split figure.

(2) For the license to exhibit each such Class B feature photoplay, the Exhibitor agrees to pay to Paramount as a minimum license fee a sum equal to thirty-five per cent (35%) of the gross receipts of the Paramount Theatre during the exhibition period thereof until said gross receipts shall reach a split figure which will allow the Exhibitor to reimburse itself out of such gross receipts for its "operating expenses," as the term is hereinafter defined, and for the minimum license fee so paid and will allow to the Exhibitor a further sum out of such gross receipts equal to fifty per cent (50%) of such minimum license fee so paid; and the Exhibitor agrees to pay to Paramount, in addition to such minimum license fee a sum equal to fifty per cent (50%) of such gross receipts in excess of such split figure.

(3) For the license to exhibit each such Class C feature photoplay, the Exhibitor agrees to pay to Paramount as license fees a sum equal to thirty per cent (30%) of the weekly gross receipts of the Paramount Theatre during the exhibition period thereof.

(4) For the license to exhibit each such Class D feature photoplay, the Exhibitor agrees to pay to

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Plaintiffs' Exhibit No. 3—(Continued)

Paramount as license fees a sum equal to twenty-five per cent (25%) of the weekly gross receipts of the Paramount Theatre during the exhibition period thereof.

(5) For the license to exhibit each such Class E feature photoplay, the Exhibitor agrees to pay to Paramount as license fees the sum of One Thousand Fifty Dollars ($1,050.00) per photoplay.

(C) The term "operating expenses," as used herein, shall be deemed to mean and shall include the usual actual cost of operating the Paramount Theatre on a straight picture policy during the exhibition period of the feature photoplay to which such term applies, expressly excluding, however, license fees for all photoplays to whomsoever payable, including but not limited to Paramount, and expressly excluding the cost of any other theatrical exhibition or form of entertainment performed by living persons on the stage or at any other part of the Paramount Theatre.

(D) If any of the aforesaid Class A, Class B, Class C or Class D feature photoplays shall be exhibited as part of a double feature program, then and in such event the Exhibitor shall pay to Paramount the license fees hereinabove specified in this Article Eight, for such feature photoplays, except that in computing such license fees there shall first be deducted from the gross receipts the license fee actually paid for the second feature on such double

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feature program, but in no event shall the amount so deducted exceed the license fee hereinabove provided in this Article Eight to be paid for the Class E feature photoplays. The cost of such second feature shall not be deemed an item of operating expense.

Ninth: (a) It is expressly understood and agreed that the designations made hereunder by Paramount in respect of each feature photoplay licensed hereunder released during the first year of the ten (10) year period hereof (except the Class A feature photoplay) to the respective price classification specified herein shall apply only to the first week's exhibition of each such photoplay. In the event any photoplay licensed hereunder shall be exhibited for a period in excess of one (1) week the license fees payable in respect of such feature photoplay for such additional period in excess of such one (1) week exhibition shall be that designated by Paramount to any of the price classifications it may so elect regardless of the price classification to which such feature photoplay may have been designated for the first week's exhibition.

(b) The license fee payable for the feature photoplays hereinabove provided for based upon a percentage of the gross receipts shall be computed separately in respect of each photoplay and separately for each week of exhibition and not cumulatively.

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Plaintiffs' Exhibit No. 3—(Continued)

Tenth: (a) The Exhibitor shall have the right to select from the short subject photoplays released during the first yearly period of the said ten (10) year period of this agreement such number of short subject photoplays released during such year as the Exhibitor may require for exhibition hereunder.

(b) Irrespective of the number of short subject photoplays which the Exhibitor may exhibit as aforesaid, the Exhibitor agrees to pay to Paramount as license fees for the license to exhibit such short subject photoplays the sum of Forty-Four Hundred and Twenty Dollars ($4420.00) during the first year of the aforesaid ten (10) year period in equal weekly installments of Eighty-five Dollars ($85.00) each payable in advance on the first business day of each and every week commencing on the first day of September, 1939.

It is understood and agreed that the aforesaid sum of Four Thousand Four Hundred and Twenty Dollars ($4,420.00) is based upon Paramount's having available for exhibition during said first year of the term of this agreement eighty-five (85) reels of short subject photoplays, and if during such yearly period Paramount shall have available for exhibition less or more than eight-five (85) reels of short subject photoplays, then and in such event the said sum of Four Thousand Four Hundred and Twenty Dollars ($4,420.00) for such year shall be proportionately decreased or increased, as the case may be, in accordance with the number of reels of short subject photoplays available for exhibition

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hereunder during each such year and the weekly instalments shall be correspondingly adjusted.

If Paramount shall release during the term hereof short subject photoplays of two reels in length, then and in such event the license fees payable for such two reel short subject photoplay shall be mutually agreed upon between the parties hereto.

(c) The Exhibitor agrees to exhibit during the first year of the ten (10) year period of this agreement each issue of Paramount Sound News during such year and to pay to Paramount as license fees for the license to exhibit each issue of the Odd Edition of such Sound News the sum of One Hundred Dollars ($100.00) per issue and for each issue of the Even Edition of such Sound News the sum of Fifty Dollars ($50.00) per issue.

Eleventh: (a) Paramount agrees to give at least fourteen (14) days' written notice to the Exhibitor of the respective dates when each respective feature photoplay and short subject photoplay shall be available for exhibition hereunder, which date shall be known as the "availability date." Within twenty-one (21) days after the mailing of such written notice of availability the Exhibitor shall give Paramount written notice of its selection or rejection of such feature photoplay and short subject photoplay and with respect to each feature photoplay and short subject photoplay rejected hereunder the license granted hereunder shall terminate and all rights herein shall revert to Para-

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Plaintiffs' Exhibit No. 3—(Continued)

mount and Paramount shall have the right to exhibit and/or license the exhibition thereof when and where desired by it. If the Exhibitor shall fail to give such written notice with respect to any such feature photoplay and/or short subject photoplay and within such twenty-one (21) day period, then and in such event such feature photoplay and/or short subject photoplay shall be deemed selected for exhibition hereunder.

(b) The Exhibitor agrees to exhibit each feature photoplay and each short subject photoplay selected as aforesaid within fourteen (14) days after the availability date of each respective photoplay as so noticed by Paramount. The date selected by the Exhibitor within said fourteen (14) day period shall be subject to the availability of prints at Paramount's Exchange then serving the Exhibitor. If no such print is available on such date then the time for the Exhibitor to exhibit such photoplay shall be within fifteen (15) days after Paramount shall have available such print.

(c) Each issue of the Sound News licensed hereunder shall be exhibited weekly in the order of general release without prior notice of availability.

Twelfth: (a) Paramount and the Exhibitor shall agree or endeavor to agree on or before August 1st of each successive year of the remaining nine (9) year period of this agreement as to the terms and conditions upon which said photoplays licensed

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Plaintiffs' Exhibit No. 3—(Continued)

hereunder for each such year commencing September 1st next ensuing shall be exhibited. Such terms and conditions to be agreed upon shall include but not be limited to classification of feature photoplays, the number of feature photoplays in each respective classification, the license fees payable for the license to exhibit feature photoplays, short subject photoplays and newsreels, clearance to be granted with respect to the theatre licensed hereunder, the minimum admission prices to be charged by the Exhibitor for admission to the Paramount Theatre during the exhibition of the photoplays licensed hereunder.

(b) It is agreed that in any event the Exhibitor shall be obligated to exhibit photoplays licensed hereunder during each year of the term hereof upon the same terms and condtions agreed to for the immediately preceding year, except, however, that if the Exhibitor shall by August 1st of any year fail or refuse to agree, if so desired by Paramount, to the same terms and condtions for the next ensuing year, commencing September 1st, as those upon which the photoplays released by Paramount shall be generally licensed by Paramount for first run exhibition in theatres located in "key cities" (as the term is used and understood in the motion picture industry) throughout the United States during such year, then in such event Paramount may at its election cancel and terminate this agreement with respect to the then remaining release years

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Plaintiffs' Exhibit No. 3—(Continued)

hereof by giving written notice to the Exhibitor of its intention so to do, such termination to be effective upon the mailing of such written notice.

(c) Notwithstanding anything to the contrary herein contained, if the Exhibitor by August 1st of any year shall fail or refuse in any event to agree to the same terms and condtions for the next ensuing year commencing September 1st as those upon which photoplays shall have been exhibited hereunder during the immediately preceding year, such failure or refusal shall be deemed a default and a material breach of this agreement by the Exhibitor, and Paramount may at its election cancel and terminate this agreement with respect to the then remaining release years hereof by giving written notice to the Exhibitor of its intention so to do, such termination to be effective upon mailing of such written notice.

Thirteen: (a) It is understood and agreed that Paramount does not warrant that it will have available for exhibition hereunder all of the feature photoplays, short subject photoplays and Paramount Sound News that are announced for release by Paramount during any year of the aforesaid ten (10) year period; and in case any feature photoplay, short subject photoplay and/or newsreel licensed for exhibition hereunder shall not be available for exhibition generally in the State of California, County of Los Angeles, the failure on the part of Paramount to deliver to the Exhibitor any

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such feature photoplay, short subject photoplay and/or newsreel for exhibition hereunder shall not be deemed a breach of this agreement on the part of Paramount nor shall the Exhibitor be entitled to any additional photoplays in substitution therefor.

(b) At any time prior to the exhibition thereof hereunder Paramount may exhibit and/or license the exhibition of not more than four (4) feature photoplays of each Group licensed hereunder as "road shows" or in any similar manner generally adopted by Paramount in the County of Los Angeles among other places; provided, however, that admission prices of at least One Dollar ($1.00) shall be charged for the majority of the orchestra seats for evening performances during such "road-show" exhibitions in said County of Los Angeles among such places. Any photoplay so road-shown shall not become available for exhibition hereunder until the completion of such road-shown exhibition and until generally released for exhibition in the County of Los Angeles.

Fourteen: (a) The term "clearance," as used herein, shall be deemed to mean the period of time which shall elapse between the conclusion of the exhibition hereunder of each respective feature photoplay by the Exhibitor and the commencement of the exhibition of such photoplay in other theatres located in the zone or zones in which the theatre of the Exhibitor covered by this agreement is located.

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Plaintiffs' Exhibit No. 3—(Continued)

(b) Subject to the provisions of Articles Eleventh and Fourteenth hereof, and subject also to the Exhibitor exhibiting the photoplays licensed hereunder as herein provided, Paramount agrees to accord to the Exhibitor in respect of the photoplays licensed hereunder for exhibition during the first year of the term hereof, the same clearance accorded by Paramount to the Exhibitor during the 1938-1939 release year, subject to such changes as may be mutually agreed upon in writing between the parties hereto from time to time.

(c) It is agreed that no clearance or specific run is granted hereunder with respect to short subject photoplays and Paramount Sound News.

Fifteenth: (a) The Exhibitor covenants and agrees that during the entire period of exhibition of each Group S-11 feature photoplay licensed hereunder, the Exhibitor will charge the follow minimum admission on prices per adult for admission to the Paramount Theatre:

25c up to 1:00 P.M.
40c from 1:00 P.M. up to 6:00 P.M.
55c from and after 6:00 P.M.

If during any release year of the term hereof the Exhibitor shall desire to charge minimum admission prices other than those agreed upon and the parties hereto shall be unable to agree upon such new minimum admission prices, such disagreement or controversy shall be settled and determined by ar-

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bitration in the manner hereinafter provided. Pending such settlement and determination by arbitration the minimum admission prices which the Exhibitor shall then be required to charge hereunder shall continue to be charged.

(b) If the Exhibitor shall charge admission prices less than the agreed minimum admission prices Paramount in addition to all other rights hereunder shall have the right:

(1) To immediately terminate the license of the motion picture then being exhibited and/or all of the remaining motion pictures not theretofore exhibited hereunder by written notice to such effect to the Exhibitor, and upon the giving of such notice the license of such motion picture or motion pictures shall forthwith terminate and revert to Paramount, and Paramount may at its option declare such failure or refusal a breach of the entire contract entitling Paramount to recover from the Exhibitor as damages therefor the license fees payable in respect of all motion pictures not theretofore exhibited hereunder, or

(2) To reduce the period of clearance which may be granted hereunder in respect of each of the motion pictures thereafter deliverable hereunder, and

(3) If the license fee of any such motion picture is to be computed either in whole or in part upon a percentage of the gross admission receipts of said theatre, then the Exhibitor shall account to

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Plaintiffs' Exhibit No. 3—(Continued)

Paramount for all admission to said theatre during the exhibition of such motion picture upon the basis of the admission prices which the Exhibitor should have charged as agreed upon.

Sixteenth: The term "gross receipts," as used in this agreement, shall be deemed to mean and shall include all sums received by the Exhibitor for admission to the theatre licensed hereunder on the date or dates of exhibition of the respective motion pictures licensed hereunder, excluding only therefrom any tax imposed by governmental authority expressly upon admissions to said theatre which is required to be collected by the Exhibitor and pursuant thereto is collected by the Exhibitor.

Seventeenth: The Exhibitor agrees to pay to Paramount, upon demand, any tax, fee, or other like charge, now and/or hereafter imposed or based upon the possession, delivery and/or the exhibition of positive prints of the photoplays licensed hereunder and/or upon any sums payable hereunder by the Exhibitor to Paramount. If, under any statute or ordinance, any such tax, fee or other like charge is and/or shall be payable or paid by Paramount and the exact amount payable hereunder by the Exhibitor is not therein definitely fixed or cannot be exactly determined, then the Exhibitor agrees to pay such part of any such tax, fee or other charge, paid or payable by Paramount as shall be fair and reasonable.

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Plaintiffs' Exhibit No. 3—(Continued)

Eighteenth: (a) The Exhibitor agrees to furnish to Paramount within three (3) days after the completion of the exhibition at said Paramount Theatre of each feature photoplay licensed hereunder, (in respect of which any percentage of the gross receipts of such theatre is payable hereunder) an itemized statement of the gross receipts derived by the Exhibitor during the exhibition period of each such photoplay, an itemized statement of sums expended for the stage show presented at the theatre during such exhibition, and any and all additional information and figures necessary to compute the license fees payable hereunder for each such feature photoplay. Such statements shall be certified by an officer of the Exhibitor.

(b) The Exhibitor agrees to keep full, accurate and complete books of account vouchers and other records, showing all gross receipts of the photoplays licensed hereunder, and any and all additional information and figures necessary to compute the license fees payable therefor hereunder, and the Exhibitor agrees that Paramount shall have access at all reasonable times through its accredited representatives to the books of account, vouchers, records and documents of the Exhibitor and/or any affiliated, or subsidiary corporation and of said Paramount Theatre, in so far as they relate to the gross receipts from the exhibition hereunder of the photoplays in respect of which any percentage of the gross receipts is payable hereunder, stage show

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expenditures, operating expenses, and also to the additional information and figures hereinbefore referred to. Such representatives shall have the right to inspect, compare and make copies of any such books of account, vouchers, records and documents. During the exhibition period of any such photoplay Paramount shall have the right to have a representative stationed at said Paramount Theatre at which such photoplay shall be exhibited, who shall have access to all parts of such theatre, including the box office, and shall have the right to check and verify ticket sales, receipts and admissions. Paramount agrees that all information obtained by it pursuant to the provisions of this Article will be treated as confidential except in any arbitration proceedings and/or litigation in respect of this agreement.

Nineteenth: (a) The Exhibitor agrees to pay to Paramount the license fees payable hereunder as follows:

(1) The Exhibitor shall pay any fixed sum and/or minimum guarantee payable hereunder in respect of any feature photoplay licensed hereunder, not later than seven (7) days after the first day of exhibition hereunder of such photoplay.

(2) The Exhibitor shall pay any sum equal to any percentage of the gross receipts of said theatre payable in respect of any photoplay licensed hereunder not later than seven (7) days after the

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last day of exhibition hereunder of such photoplay at such theatre.

(b) It is agreed that the acceptance by Paramount of any sum tendered by the Exhibitor in full payment of any license fee payable hereunder or any statement furnished hereunder shall not estop or prevent Paramount from thereafter disputing the correctness of the amount of each such respective payment of statement.

Twentieth: (a) The license to exhibit each respective photoplay licensed hereunder is upon the following express conditions:

(1) The Exhibitor shall exhibit each respective photoplay without alteration or change whatsoever, except as required by any duly constituted public authority.

(2) The Exhibitor shall not remove the trademark of Paramount from any positive print of any photoplay licensed hereunder.

(3) The Exhibitor, in all advertising and exploitation of each photoplay licensed hereunder, shall advertise and announce each such photoplay as "A Paramount Picture" or as otherwise directed by Paramount, and shall otherwise adhere to the form of announcement contained in the advertising matter issued by Paramount in respect of each such photoplay.

(4) The Exhibitor shall not advertise or announce any of the photoplays licensed hereunder

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Plaintiffs' Exhibit No. 3—(Continued)

that shall be "road-shown" by means of lithographs, slides, trailers, leaders, lobby displays, booklets, circulars, window cards, newspaper announcements and/or in any other manner whatsoever, until after the completion of the "road showing" of such respective photoplay.

(b) The Exhibitor agrees to lease from Paramount, at Paramount's list rates, advertising material and accessories in respect of the photoplays licensed hereunder, of the selection and in the quantities determined by the Exhibitor from time to time, subject to Paramount's having available any such advertising material and accessories ordered by the Exhibitor. The said advertising material and accessories so leased shall not be traded, subrented, sold or given away by the Exhibitor, but shall be returned, postage or expressage prepaid, to the Paramount Exchange then serving the Exhibitor, immediately upon the completion of the exhibition of the photoplay with respect to the said advertising material or accessories which shall have been used. Provided the Exhibitor shall return in good, usable condition (as determined by Paramount) such advertising material or accessories, within five (5) days after the final playdate of each photoplay in respect of which such materials shall be used, Paramount agrees to credit to the Exhibitor's account with respect to such advertising materials and accessories, such sums for the material so returned as it credits to other exhibitors

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during each year of the term of this agreement. If such material shall be returned within the five (5) day period specified hereunder in damaged condition, unfit for use, the credit so allowed to the Exhibitor shall be in a lesser amount in accordance with the credits given in such cases to other exhibitors. It is further understood and agreed that if any such advertising material shall not be returned as herein provided, the Exhibitor will not be entitled to any credit whatsoever in respect of such advertising material.

(c) If Paramount shall distribute trailers of its photoplays the Exhibitor agrees to lease from Paramount for use only in connection with the motion pictures licensed hereunder all trailers used by the Exhibitor, upon such terms and conditions as the parties hereto may mutually agree from time to time. If the parties shall be unable to agree, such terms shall be determined by arbitration in accordance with the provisions of Article Twenty-Fifth hereof.

Twenty-First: Paramount agrees to deliver to the Exhibitor at Paramount's Exchange then serving the said theatre at which the exhibition of the photoplays licensed hereunder is licensed, a positive print of each respective photoplay in time for such exhibition hereunder. Upon the completion of the respective exhibitions hereunder of each such positive print, the Exhibitor agrees to return to such Exchange of Paramount, such positive print,

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together with the reels and containers furnished therefor. The Exhibitor agrees to pay to Paramount a sum equal to replacement cost, at Paramount's Exchange then serving the Exhibitor, for each linear foot of any positive print lost, stolen or destroyed or injured in any way in the interval between the delivery thereof to the Exhibitor and the return thereof to Paramount. Such payment, however, shall not transfer to the Exhibitor title to or any interest in any such positive print, or in any photoplay, nor release the Exhibitor from any liability arising out of any breach of this agreement.

Twenty-Second: (a) In case the Exhibitor shall be delayed in or prevented from the performance of this agreement with respect to any of the photoplays licensed hereunder, by reason of censor ruling, the elements, accidents, strikes, fires, insurrection, epidemics, act of God, public enemy, public calamity, order of any court of competent jurisdiction, order or act of any duly constituted governmental authority, or for any other cause whatsoever beyond its control, then such delay or failure of performance in respect of such photoplays shall be excused and all claims or causes of action for damages in respect thereof are hereby waived by Paramount. Paramount may exhibit and/or license to any other exhibitor or exhibitors in the city wherein the Exhibitor has been so delayed or prevented from performing as above stated, for the same run as is granted the Exhibitor hereunder,

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the exhibition of any and all such photoplays which the Exhibitor has been prevented or delayed from exhibiting hereunder by reason of any of the aforesaid causes. The Exhibitor agrees that any such delay or failure of performance shall not affect this agreement as to all other photoplays licensed hereunder; and further agrees that promptly after the removal or abatement of the causes of such delay or prevention of performance, the Exhibitor will resume performance of this agreement with respect to any photoplay, the exhibition of which was so prevented or delayed, provided that such removal or abatement shall have been effected within sixty (60) days from the happening of any of the aforesaid causes and Paramount shall not have exhibited or licensed another exhibitor to exhibit, in the city wherein the Exhibitor has been so delayed or prevented from performance, any such photoplay as above stated.

(b) In case the Exhibitor shall be delayed in or prevented from the performance of this agreement by reason of any of the causes enumerated in sub-division (a) of this Article Twenty-Second, and such delay or prevention shall continue for a period in excess of four (4) months, when and in such event, Paramount may at its option terminate this agreement by written notice to the Exhibitor, such notice of termination to become effective at the end of ten (10) days after the receipt of such notice by the Exhibitor unless within such ten (10)

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Plaintiffs' Exhibit No. 3—(Continued)

day period, the Exhibitor shall pay to Paramount liquidated damages in respect of those unexhibited photoplays licensed and available for exhibition hereunder during the entire period when the Exhibitor was so delayed in or prevented from the performance of this agreement, the amount of such liquidated damages to be computed and determined in accordance with the provisions of Article Twenty-Eight of this agreement. If Paramount shall have licensed the exhibition of any of such photoplays to any other exhibitor or exhibitors in the city wherein the Exhibitor has been so delayed or prevented from performing, for the same run as is granted to the Exhibitor hereunder, then there shall be deducted from the amount payable by the Exhibitor under the provisions of this Article Twenty-Second (b) the sums received by Paramount as license fees for such photoplays which shall have been so licensed to any other exhibitor or exhibitors.

(c) In case Paramount shall be delayed in or prevented from the performance of this agreement with respect to any of the photoplays licensed hereunder, by reason of the elements, accidents, strikes, fire, insurrection, epidemics, act of God, the public enemy, public calamity, order of any court of competent jurisdiction, orders or acts of any duly constituted governmental authority, censorship ruling, delays of any carrier, delays in production or failure of any producer of any such photoplays to make or deliver them to Paramount, or of any star

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or other performer to appear therein in time for delivery as herein provided, or any other similar or dissimilar cause whatsoever beyond the control of Paramount, then such delay or failure of performance in respect of such photoplays shall be excused and all claims or causes of action for damages therefor are hereby waived by the Exhibitor. Such delay or failure of performance shall not affect this agreement as respects all other photoplays licensed hereunder.

Twenty-Third: (a) Paramount does not warrant that it will release in any one year of the period referred to in Article First hereof, for exhibition hereunder, any specific number of photoplays. It is agreed and understood, however, that if Paramount, during any release year of the term hereof, shall release less than twenty-six (26) feature photoplays, Paramount shall incur no liability whatsoever by reason thereof, except, however, that the Exhibitor, upon the expiration of such release year may, at its election, cancel and terminate this agreement by giving written notice to that effect to Paramount.

(b) It is agreed that Paramount may, if it so desires, cease the distribution of any and all short subject photoplays and/or Paramount Sound News at any time during the period referred to in Article First hereof without in any wise affecting this agreement as respects all other photoplays licensed hereunder.

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Plaintiffs' Exhibit No. 3—(Continued)

Twenty-Fourth: (a) If the Exhibitor shall file a voluntary petition in bankruptcy or be adjudicated a bankrupt or be adjudged insolvent by any State or Federal Court of competent jurisdiction, or if the Exhibitor shall file under the Bankruptcy Act a petition or answer for reorganization, or if an involuntary petition shall be filed under the Bankruptcy Act for reorganization and such petition shall be approved, or if there shall be made a general assignment of the Exhibitor's assets for the benefit of creditors, or if a Receiver (other than a Receiver in Bankruptcy) shall be appointed for substantially all of the assets of the Exhibitor and such appointment be not vacated within sixty (60) days from the date thereof, then and upon the happening of any of such events and within a reasonable time thereafter, Paramount may (in addition to any other rights and remedies that Paramount may have in such respect) cancel the license herein granted as respects any and all photoplays not theretofore exhibited hereunder, by giving written notice to the Exhibitor of its intention so to do.

(b) Subject to the provisions of sub-division (a) of this Article Twenty-Fourth, it is agreed that if either the Exhibitor or Paramount shall breach any of the provisions of this agreement or default hereunder other than the obligation on the part of the Exhibitor to pay the license fees required herein, then in such event the defaulting party shall be

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Plaintiffs' Exhibit No. 3—(Continued)

allowed a period of ten (10) days after receiving written notice of such breach or default by the non-defaulting party within which to cure such breach or default.

Twenty-Fifth: Any disagreement and/or controversy and/or any dispute that shall arise as respects the interpretation of this agreement, and/or the rights or duties of either of the parties thereto, and/or any other claim or controversy that shall arise under this agreement or the breach thereof, shall be determined by arbitration in accordance with the Rules then obtaining of the American Arbitration Association, or if said Association is not then in existence, in accordance with the laws of the State of New York governing arbitration, and judgment upon the award rendered may be entered in the highest court of the forum, State or Federal, having jurisdiction. The arbitration hereunder shall be held in New York City, unless the parties shall otherwise agree in writing. The arbitrators shall be appointed in the manner following:

Either party shall appoint an arbitrator and give written notice by registered mail of such appointment to the other party and to the American Arbitration Association. The other party, within ten (10) days after the date of receipt of such notice of appointment, shall appoint a second arbitrator and give written notice by registered mail of such appointment to the first party and within ten (10) days after such appointment, such two (2) arbitra-

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Plaintiffs' Exhibit No. 3—(Continued)

tors shall appoint a third arbitrator and the decision or award of any two of such three arbitrators shall be final and binding and conclusive upon the parties hereto. If such other party fails to appoint the arbitrator to be appointed by it, or if such arbitrators appointed by or for the respective parties shall fail to appoint such third arbitrator, then and in either such event, such then unappointed arbitrator shall be appointed by the then Arbitration Committee of the American Arbitration Association. The parties hereto agree that pending the arbitration and until the determination by arbitration of any matter referable to arbitration hereunder, neither party shall resort to any court to determine, enforce or protect the rights of either party hereunder. If any such disagreement or controversy shall involve a question in respect of license fees and/or clearance, the Exhibitor agrees to produce before such arbitrators its books of account, and records showing the gross receipts and the operating expenses of the respective theatres, for a reasonable period of time prior thereto, at which photoplays licensed hereunder shall be exhibited. All expenses and fees of such arbitration and all other necessary expenses and costs of any arbitration hereunder shall be shared and borne equally by the parties hereto. Performance of this agreement by Paramount and the Exhibitor pending such arbitration, shall not be suspended but shall be continued without prejudice to either party hereunder.

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Plaintiffs' Exhibit No. 3—(Continued)

Twenty-Sixth: (a) Any waiver from time to time by either party to this agreement of any breach of any terms or conditions of this agreement or any rights thereunder shall not be deemed to be a continuing waiver or a consent to any subsequent breach and shall not estop or prevent such party from thereafter enforcing similar rights subsequently arising under this agreement.

(b) This agreement is entire and complete and no representations or warranties of any kind have been made by either party hereto to the other except as in this agreement expressly set forth. It is agreed that neither party is the agent or partner of the other party and neither party shall be liable for or bound by any representation or act or by the other party.

(c) This agreement is declared to be personal with respect to the parties hereto and neither party shall assign the same or any of its rights or liabilities hereunder without the written consent of the other party first had and obtained, except that without the consent of the Exhibitor Paramount may assign or transfer this agreement or any part thereof to any parent, subsidiary or affiliated corporation of Paramount Pictures, Inc., now or hereafter formed, or may transfer or assign this agreement or any part thereof pursuant to any merger, dissolution, combination or consolidation with any other corporation. Subject to the provisions of Article Twenty-Ninth hereof, it is agreed that this

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Plaintiffs' Exhibit No. 3—(Continued)

agreement may be transferred and assigned as a whole and not in part by the Exhibitor to Fanchon & Marco, Inc., a California corporation, provided the said Fanchon & Marco, Inc., shall by written instrument, expressly assume and agree to fully, faithfully and promptly comply with and perform each and every covenant, term, and condition hereunder on the part of the Exhibitor to be performed, and that no such transfer or assignment shall be effective unless and until a counterpart original of such written instrument of transfer or assignment, duly acknowledged by or on behalf of each party executing the same has been delivered to Paramount. No such transfer or assignment shall release the Exhibitor originally named in this agreement from any liability undertaken or obligation hereunder, and it is agreed that upon such transfer or assignment Paramount may, without notice to or further consent from the Exhibitor, modify, amend or extend any term, condition, provision or undertaking of this agreement or enter into new agreements relating to the subject matter of this agreement, and whenever Paramount is required hereunder to give notice to the Exhibitor, notice to Fanchon & Marco, Inc., as transferree or assignee shall be deemed sufficient notice. It is understood and agreed that such assignment or transfer shall not be deemed to grant to Fanchon & Marco, Inc., the right to further assign this agreement or any right or interest therein.

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Plaintiffs' Exhibit No. 3—(Continued)

Twenty-Seventh: If during the term of this agreement Paramount shall distribute generally any of the photoplays licensed hereunder, produced in conjunction with television or upon third dimension film and/or wide film, then and in that event, the licenses granted to the Exhibitor hereunder shall be deemed to include such photoplays, provided however, that such licenses shall be subject to any and all limitations and restrictions imposed upon Paramount as a condition of licensing the exhibition thereof, by reason of patent rights, copyrights and any and all other rights in connection with the production and distribution of such feature photoplays with television, third dimension film and/or wide film, and the exhibition thereof in the theatres hereinbefore referred to in this agreement. Any and all terms and condtions pertaining to the exhibition of such photoplays not set forth in this agreement, shall be determined by negotiation between Paramount and the Exhibitor, from time to time, as the occasion requires, and if such negotiations shall result in a disagreement, the matter shall be determined by arbitration in the manner hereinbefore provided. The license fees and other charges to be paid by the Exhibitor to Paramount in respect of the exhibition of such photoplays shall likewise be determined by negotiation, or in the event of disagreement, by arbitration.

Twenty-Eighth: Subject to the provisions of Article Twenty-Second hereof, if the Exhibitor fails

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Plaintiffs' Exhibit No. 3—(Continued)

or refuses to exhibit any photoplay licensed hereunder, at said theatre, as provided in this agreement, then and in such event, the Exhibitor shall pay to Paramount as liquidated damages, in lieu of any other amounts payable hereunder in respect of any such photoplay, whether as license fees or otherwise, (1) an amount equal to any fixed sum, payable in respect of such exhibition of such photoplay; and/or (2) in case any percentage of the gross receipts of the theatre is payable hereunder as the license fee or any part thereof in respect of any such photoplay, then and in that event the gross receipts of such theatre for the purpose of computing such percentage shall be deemed to be the average gross recepits of such theatre during the exhibition of the feature photoplays licensed hereunder released during the same release year, exhibited at such theatre prior thereto and the liquidated damages shall be the agreed percentages of such average gross receipts; if no average gross receipts can be computed in respect of any such release year, then the average gross receipts of such theatre during the exhibition of the feature photoplay licensed hereunder released during the immediately preceding release year shall be deemed to be the gross receipts for the purpose of such computation. However, if the fixed sum referred to in subdivision (1) of this Article Twenty-Eighth shall be a minimum guaranteed sum payable on account of a percentage of the gross receipts of said

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Plaintiffs' Exhibit No. 3—(Continued)

theatre covered hereunder, then the Exhibitor shall pay to Paramount,

(a) a sum equal to the percentage of such average gross receipts which is payable hereunder if such sum payable to Paramount shall be more than such minimum guaranteed sum, or

(b) such minimum guaranteed sum if such sum payable to Paramount based upon a percentage of the gross receipts shall be less than such minimum guaranteed sum.

Twenty-Ninth: (a) It is understood and agreed that if the lease covering the Paramount Theatre located in the City of Los Angeles, California, entered into between Paramount Pictures, Inc., and Partmar Corporation, (the Exhibitor) executed and delivered simultaneously with this license and agreement, and dated August 30th, 1939, as of January 1st, 1939, shall for any reason be cancelled or terminated, or if the Exhibitor shall sell, assign or transfer or in any way part with the aforesaid lease or any interest therein, or if Paramount or its assignee shall be divested or foreclosed of the ownership or interest in the said Paramount Theater, then and in such event Paramount may at its option (in addition to any other rights and remedies which Paramount may have at law or in equity or as otherwise provided for in this agreement) cancel and terminate this agreement as respects any and

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Plaintiffs' Exhibit No. 3—(Continued)

all photoplays not theretofore exhibited hereunder upon giving written notice to such effect to the Exhibitor, such termination to be effective upon the mailing of such written notice. Nothing herein contained shall relieve the Exhibitor of its obligation to pay to Paramount the license fees with respect to the photoplays theretofore exhibited by it hereunder. It is agreed, however, that if Paramount or its assignee shall be divested or foreclosed of the ownership or interest in the said Paramount Theatre and the Exhibitor shall continue to lawfully remain in possession of said theatre and actively operate the same, then and in such event this agreeshall not be cancelled or terminated so long as the Exhibitor continues to lawfully remain in possession of said theatre and actively operates the same.

(b) It is agreed that at all times during the term of this agreement all of the issued and outstanding capital stock of the Exhibitor shall be owned and held by Fanchon & Marco, Inc., a California corporation, or that a majority of said stock of the Exhibitor shall be owned and held by the persons constituting the owners and holders of a majority of the issued and outstanding capital stock of said Fanchon & Marco, Inc., as hereinafter provided, and that a majority of said stock of said Fanchon & Marco, Inc., shall at all such times be owned and held by Marco Wolff, Fanchon Simon, H. C. Arthur, Jr., Sam Dembow, Jr., and J. H. Partington, or by any three (3) of them, and if

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Plaintiffs' Exhibit No. 3—(Continued)

at any time or times during the term of this agreement either (1) the capital stock of the Exhibitor or a majority of the capital stock of said Fanchon & Marco, Inc., shall cease to be so owned and held whether due to the voluntary act of any one or more of the aforementioned parties, or by operation of law, or (2) if less than two (2) of said persons hereinabove named shall be in actual charge of the conduct, management or operation of the Paramount Theatre, or the booking and contracting of motion pictures to be exhibited at said theatre, or (3) in the event the Exhibitor shall merge, combine or consolidate with any other firm or corporation or enter into an arrangement by which the motion picture photoplays shall be contracted for or booked for exhibition or the said theatre operated by any person, firm or corporation other than by the Exhibitor and at least two (2) of said persons hereinabove named, or (4) if the Exhibitor shall have forfeited or lost its charter and such forfeiture shall not have been rescinded or set aside or said charter not renewed within thirty (30) days thereafter, then upon the happening of any one or more of such events and at any time thereafter Paramount may at its option cancel and terminate this agreement with respect to any and all photoplays not theretofore exhibited hereunder by the Exhibitor by giving written notice to such effect to the Exhibitor and upon the mailing of such written notice this license and agreement shall be forthwith cancelled and terminated.

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Plaintiffs' Exhibit No. 3—(Continued)

Nothing herein contained shall relieve the Exhibitor of its obligation to pay to Paramount the license fees with respect to the photoplays theretofore exhibited by it hereunder.

Thirteenth: Any and all notices hereunder (except notices of availability and notices of classification which may be sent by ordinary mail) shall be served only by registered United States mail addressed, when intended for Paramount, to 1501 Broadway, New York City, New York, and when intended for the Exhibitor, to Paramount Theatre, Los Angeles, California. Any party hereto may change its mailing address from time to time by an appropriate notice to the other. To constitute due notice hereunder from one party to another, such notice must be mailed within the period of time specified in this agreement, but the time within which the recipient thereof shall be required to act thereon shall not be deemed to have begun to run until the date of the actual receipt of such notice as evidenced by the Post Office return receipt, or (if the addresses shall have refused to accept the registered notice) the date on which such registered notice shall have been first tendered to it.

Thirty-First: This agreement having been entered into and executed in the City of New York, State of New York, it is agreed that the laws to be applied to any matter arising hereunder shall be that of the State of New York.

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Plaintiffs' Exhibit No. 3—(Continued)

In Witness Whereof, Paramount Pictures, Inc., and Partmar Corporation have hereunto caused their respective corporate seals to be hereunto affixed and this agreement signed by their respective duly authorized officers, all on the day and year first above named.

PARAMOUNT
PICTURES, INC.,

By /s/ NEIL F. AGNEW,

Attest:

/s/ NORMAN COLLYER,
Asst. Secy.

PARTMAR CORPORATION,

By /s/ J. A. PARTINGTON,
Pres.

Attest:

/s/ Indistinguishable,

/s/ SAMUEL SHOYAN,
Asst. Secretary.

State of New York,
County of New York.

On this 30th day of August, 1939, before me personally came J. A. Partington, to me known, who, being duly sworn, did depose and say that he resides at 400 Park Avenue, N.Y.C.; that he is President of Partmar Corporation, the corporation described in and which executed the above instrument; that he knows the seal of said corporation;

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Plaintiffs' Exhibit No. 3—(Continued)

that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

/s/ SAMUEL SHAYON,
Notary Public.

State of New York,
County of New York—ss.

On this 30th day of August, 1939, before me personally came Neil F. Agnew, to me known who, being duly sworn, did depose and say that he resides at 417 Park Ave., New York, N. Y.; that he is vice-president of Paramount Pictures, Inc., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

/s/ ARTHUR ISRAEL, JR.,
Notary Public.

Admitted November 14, 1950.

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PLAINTIFFS' EXHIBIT No. 4

Agreement dated as of September 1, 1942, between Paramount Pictures, Inc., a New York corporation, party of the first part, (hereinafter referred to as "Paramount") and Partmar Corporation, a California corporation, party of the second part, (hereinafter referred to as the "Exhibitor").

Witnesseth:

Whereas, Paramount and the Exhibitor entered into an agreement dated the 30th day of August, 1939, as of the 1st day of September, 1939, (hereinafter referred to as the "Franchise Agreement") under and pursuant to which a license was granted by Paramount to the Exhibitor to exhibit at the Paramount Theatre, Los Angeles, California, certain feature photoplays (to be selected as therein provided), short subject photoplays and each issue of two editions of Paramount Sound News, which shall be generally released for exhibition at motion picture theatres in the United States during the period of ten (10) years commencing September 1, 1939, and ending August 31, 1949, in accordance with and subject to the terms, covenants and conditions thereof, which Franchise Agreement was from time to time amended, modified and/or supplemented by instruments in writing entered into between the parties, and

Whereas, Paramount and the Exhibitor desire to extend the Franchise Agreement as aforesaid amended, modified and/or supplemented.

Now, Therefore, in consideration of the premises

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Plaintiffs' Exhibit No. 4—(Continued)

and of the mutual covenants, terms and conditions herein contained, and for other good and valuable considerations by each of the parties hereto to the other, the receipt and sufficiency of which are hereby acknowledged, it is covenanted and agreed by and between the parties, as follows:

The Franchise Agreement, as aforesaid amended, modified and/or supplemented, shall be and hereby is extended to embrace and include the feature photoplays (to be selected as therein provided), short subject photoplays and each issue of two editions of Paramount Sound News (except any and all photoplays excluded pursuant to article Second of the Franchise Agreement) which shall be generally released by Paramount, its successors or assigns, as "Paramount Pictures" or under the trademark "Paramount," or by any parent, subsidiary or affiliated company thereof now or hereafter formed to distribute or having the distribution rights of motion pictures generally released as "Paramount Pictures" under the trade-mark "Paramount," for exhibition at motion picture theatres in the United States during the period commencing September 1, 1949, and ending March 18, 1952, upon the same terms, provisions and conditions contained therein. The terms, provisions and conditions contained in said Franchise Agreement as aforesaid amended, modified and/or supplemented, shall apply with appropriate modifications in the text thereof to such extended period and photoplays embraced or included therein. The

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Plaintiffs' Exhibit No. 4—(Continued)

provisions of subdivision (a) of article Twenty-Ninth of the Franchise Agreement shall hereafter apply and remain in full force and effect with respect to the certain lease referred to therein between the parties hereto, covering the Paramount Theatre in Los Angeles, California, dated August 30, 1939, as of January 1, 1939, as amended by agreement dated as of September 1, 1942, between said parties.

Except as herein expressly provided, the Franchise Agreement as hereby extended and all aforesaid amendments, modifications and supplements thereof, shall be and remain in full force and effect.

In Witness Whereof, the parties hereto have hereunto caused their respective corporate seals to be affixed and this instrument to be signed by their respective officers thereunto duly authorized as of the day and year first above written.

PARAMOUNT PICTURES, INC.,

By /s/ NEIL F. AGNEW,
Vice-President.

Attest:

/s/ NORMAN COLLYER,
Ass't. Sec'y.

PARTMAR CORPORATION,

By /s/ MARIO WOLFF,
Vice-President.

Attest:

/s/ HARRY WALLER,
Asst. Sec'y.

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Plaintiffs' Exhibit No. 4—(Continued)

State of New York,
County of New York—ss.

On this 18th day of January, 1943, before me personally came Neil Agnew, to me known, who, being duly sworn, did depose and say that he resides at 417 Park Ave., New York, N. Y.; that he is Vice-President of Paramount Pictures Inc., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

/s/ ANNA G. VIDICH,
Notary Public.

Commission expires March 30, 1943.

State of California,
County of Los Angeles—ss.

On this 8th day of Feb., 1943, before me personally came Marco Wolff, to me known, who, being duly sworn, did depose and say that he resides at 320 Delfern Dr., Los Angeles, Calif.; that he is Vice-President of Partmar Corporation, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of

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Plaintiffs' Exhibit No. 4—(Continued)

the Board of Directors of said corporation, and that he signed his name thereto by like order.

/s/ P. P. BRUSH,
Notary Public.

My Commission expires July 12, 1945.

Admitted November 14, 1950.

PLAINTIFFS' EXHIBIT No. 7

United States District Court
Southern District of New York

Equity No. 87-273

UNITED STATES OF AMERICA,
Plaintiff,

against

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPO-

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Plaintiffs' Exhibit No. 7—(Continued)

RATION, COLUMBIA PICTURES CORPORATION, SCREEN GEMS, INC., COLUMBIA PICTURES OF LOUISIANA, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGES, INC., and UNITED ARTISTS CORPORATION,

Defendants.

DECREE

The court having rendered its opinion herein on June 11, 1946, having duly considered the proposals of the parties and of amici curiae as to its findings and judgment, and having filed its findings of fact and conclusions of law, wherein certain of the defendants herein were found to have violated the Act of Congress approved July 2, 1890, 26 Stat. 209, commonly known as the Sherman Act,

It Is Hereby Ordered, Adjudged and Decreed, as follows:

I.

1. The complaint is dismissed as to the defendants Screen Gems, Inc. and the corporation named as Universal Pictures Company, Inc., merged during the pendency of this case into the defendant Universal Corporation. The complaint is also dismissed as to all claims made against the remaining defendants herein based upon their acts as producers, whether as individuals or in conjunction with others.

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Plaintiffs' Exhibit No. 7—(Continued)

II.

Each of the defendant distributors, Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loews, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation [formerly known as Vitagraph, Inc.]; Twentieth-Century Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation; and the successors of each of them, and any and all individuals who act in behalf of any thereof with respect to the matters enjoined, and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

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Plaintiffs' Exhibit No. 7—(Continued)

3. From granting any clearance between theatres not in substantial competition.

4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof.

5. From further performing any existing franchise to which it is a party and from making any franchises in the future. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal" covering the exhibition of features

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Plaintiffs' Exhibit No. 7—(Continued)

in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

8. From licensing in the future any feature for exhibition in any theatre, not its own, in any manner except the following:

(a) A license to exhibit each feature released for public exhibition in any competitive area shall be offered to the operator of each theatre in such area who desires to exhibit it on some run [other than that upon which such feature is to be exhibited in the theatre of the licensor] selected by such operator, and upon uniform terms;

(b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others;

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Plaintiffs' Exhibit No. 7—(Continued)

(c) Where a run is desired, or is to be offered, upon terms which exclude simultaneous exhibition in competing theatres, the distributor shall notify, not less than thirty days in advance of the date when bids will be received, all exhibitors in the competitive area, offering to license the features upon one or more runs, and in such offer shall state the amount of a flat rental as the minimum for such license for a specified number of days of exhibition, the time when the exhibition is to commence and the availability and clearance, if any, which will be granted for each such run. Within fifteen days after receiving such notice, any exhibitor in such competitive area may bid for such license, and in his bid shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make. The distributor may reject all offers made for any such feature, but in the event of the acceptance of any, the distributor shall grant such license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor. The method

Plaintiffs' Exhibit No. 7—(Continued)

of licensing specified in this subdivision shall not be required in areas where there is no competition among theatres or in run, or in which there is no offer made by any exhibitor within the time above mentioned. The words "exclude simultaneous exhibition" shall be held to mean the exhibition of a specified run in one theatre with clearance over other theatres in the competitive area. The words "competitive area" shall refer to the territory occupied by more than one theatre in which it may fairly and reasonably be said that such theatres compete with each other for the exhibition of features on any run.

(d) Each license shall be offered and taken theatre by theatre and picture by picture.

(e) A theatre is not a defendant's own theatre unless it owns therein a legal or equitable interest of ninety-five per cent or more, either directly or through affiliates or subsidiaries.

9. From arbitrarily refusing the demand of an exhibitor, who operates a theatre in competition with another theatre not owned or operated by a defendant distributor, or its affiliate or subsidiary, made by registered mail, addressed to the home office of the distributor, to license a feature to him for exhibition on a run selected by the exhibitor, instead of licensing it to another exhibitor for exhibition in his competing theatre on such run.

Plaintiffs' Exhibit No. 7—(Continued)

Such demand shall be deemed to have been refused either upon the receipt by the exhibitor of a refusal in writing or upon the expiration of ten days after the receipt of the exhibitor's demand.

III.

Each of the defendant exhibitors, Paramount Pictures, Inc., Loews, Incorporated, Radio-Keith-Orpheum Corporation, Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation, Warner Bros. Pictures, Warner Bros. Circuit Management Corporation, Twentieth Century Fox Film Corporation, and National Theatres, Inc is hereby enjoined and restrained:

(1) From performing or enforcing agreements referred to in paragaphs 5 and 6 of the foregoing section II hereof to which it may be a party.

(2) From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.

(3) From making or continuing to perform agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.

Plaintiffs' Exhibit No. 7—(Continued)

(4) From making or continuing leases of theatres under which it leases any of its theatres to another defendant or to an independent operating a theatre in the same competitive area in return for a share of the profits.

(5) From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or shares of stock or otherwise, in conjunction with another defendant, and from continuing to own or acquire such an interest in conjunction with an independent [meaning any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question,] where such interest shall be greater than five per cent unless such interest shall be ninety-five per cent or more. The existing relationships which violate this provision shall be terminated within two years. The relationships between the defendants and independents which violate this provision shall be terminated by a sale to, or purchase from the co-owner or co-owners, or by a sale to a party not one of the other defendants. In dissolving relationships among defendants and between defendants and independents which violate this provision, one defendant may acquire the interest of another defendant or independent if such defendant desiring to acquire such interest shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrains competition in the exhibition of feature motion pictures. Each of the defendants shall submit to

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Plaintiffs' Exhibit No. 7—(Continued)

this court within six months a statement outlining the extent to which it has complied and the manner in which it proposes to comply with this provision, setting forth in detail the names, locations, and general descriptions of the theatres, corporate securities, and beneficial interests of any kind involved, the sales thereof that it has made, and such interests as it proposes to acquire, with a statement of facts regarding each competitive situation involved in such proposed acquisition sufficient to show the probable effect of such acquisition on that situation. Similar reports shall be made quarterly thereafter until this provision shall have been fully complied with. Reasonable notice of such acquisition plans shall be served upon the Attorney General and plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the court.

(6) From expanding its present theatre holdings in any manner whatsoever except as permitted in the preceding paragraph.

(7) From operating, booking, or buying features for any of its theatres through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate.

IV.

Nothing contained in this Decree shall be construed to limit, in any way whatsoever, the right of each distributor-defendant to license, or in any way to arrange or provide for, the exhibition of any or

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Plaintiffs' Exhibit No. 7—(Continued)

all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such distributor defendant has or may acquire pursuant to the terms of this Decree, a proprietary interest of ninety-five per cent or more either directly or through subsidiaries.

V.

The provisions of the existing consent decree are hereby declared to be of no further force or effect, except insofar as may be necessary to conclude arbitration proceedings now pending and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, incurred in the establishment of the consent decree arbitration systems. Existing awards and those made pursuant to pending proceedings shall continue to be enforceable. But this shall in no way preclude the parties or any other persons from setting up a reasonable system of arbitration either through the use of the present boards or any others as among themselves.

VI.

For the purpose of securing compliance with this Decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any defendant, reasonable as to time and subject matter, made to such defend-

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Plaintiffs' Exhibit No. 7—(Continued)

ant at its principal office, and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for such defendant company may be present.

Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

VII.

Paragraphs 7 and 8 of section II of this judgment shall not become effective until July 1, 1947.

VIII.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to the judgment

Plaintiffs' Exhibit No. 7—(Continued)

and no others, to apply to the court at any time for such orders or direction as may be necessary or appropriate for the construction, modification, or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

IX.

The operation of this judgment is stayed for sixty days from the date hereof, and if an appeal is taken, for thirty days thereafter in order to enable any appellant to move before the Supreme Court for a stay in respect to any portion of the judgment from which an appeal has been taken.

Dated, December 31, 1946.

AUGUSTUS N. HAND,
United States Circuit Judge.

HENRY W. GODDARD,
United States District Judge.

JOHN BRIGHT,
United States District Judge.

United States of America,
Southern District of New York—ss.

I, William V. Connell, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate have been compared with their originals on file and remaining of record in

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Plaintiffs' Exhibit No. 7—(Continued)

this office; that they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 23rd day of April in the year of our Lord one thousand nine hundred and forty-seven and of the Independence of the United States the One Hundred and Seventy-first.

[Seal] /s/ WILLIAM V. CONNELL,
Clerk.

Admitted November 15, 1950.

PLAINTIFFS' EXHIBIT No. 10

United States District Court for the Southern District of New York

Equity No. 87-273

UNITED STATES OF AMERICA,
Plaintiff,

against

PARAMOUNT PICTURES INC., et al.,
Defendants.

CONSENT JUDGMENT AS TO THE PARAMOUNT DEFENDANTS

The plaintiff, United States of America, having

Plaintiffs' Exhibit No. 10—(Continued)

filed its Amended and Supplemental Complaint in this action on November 14, 1940; the defendants, Paramount Pictures Inc. and Paramount Film Distributing Corporation, (hereinafter sometimes referred to as the "Paramount defendants"), having filed their Answers to such Complaint, denying the substantive allegations thereof; the Court after trial having entered a decree herein, dated December 31, 1946, as modified by order entered February 11, 1947; the plaintiff and the Paramount defendants, among others, having appealed from such decree; the Supreme Court of the United States having in part affirmed and in part reversed such decree, and having remanded this cause to this Court for further proceedings in conformity with its opinion dated May 3, 1948; and this Court having, on June 25, 1948, by order made the mandate and decree of the Supreme Court the order and judgment of this court; and

The Paramount defendants, having represented to the plaintiff and to this Court that they propose, for the purpose of avoiding discrimination against other exhibitors and distributors, promoting substantial independent theatre competition for the Paramount theatres and promoting competition in the distribution and exhibition of films generally (1) to divorce their domestic exhibition business from their production and distribution business, (2) to divest Paramount Pictures Inc., and the divorced exhibition business of all interest in a minimum of 774 theatres, and (3) to subject themselves and said

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Plaintiffs' Exhibit No. 10—(Continued)

divorced distribution and exhibition businesses to injunctive provisions, all as hereinafter set forth; and that accordingly they propose to adopt prior to April 19, 1949, a plan of reorganization which will have as its purpose and effect the complete divorcement of the ownership and control of all of the theatre assets of Paramount Pictures Inc., located in the United States from all other assets of the Paramount defendants; that pursuant to such plan two new corporations will be formed, one of which (hereinafter called the New Theatre Company) will own directly or indirectly all of the said theatre assets; and the other of which (hereinafter called the New Picture Company) will own directly or indirectly all of the said other assets; and that thereafter Paramount Pictures Inc., will be dissolved; and that for the purpose of establishing separate ownership and control of the said two new corporations the stock of the New Theatre Company will be delivered to a Trustee who will hold such stock subject to the terms and conditions of this judgment, and certificates of interest representing such trusteed stock will be issued by the Trustee, and such certificates of interest together with the stock in the New Picture Company will be distributed pro rata by Paramount Pictures Inc., among its stockholders; and Paramount Pictures Inc., having set forth certain understandings with and made certain representations to the Attorney General in a letter filed herewith; and

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Plaintiffs' Exhibit No. 10—(Continued)

The Paramount defendants having consented to the entry of this judgment after the taking of evidence upon the remand of this cause by the Supreme Court to this Court but without rendition of any decision by this Court upon any of the issues and matters which were to be determined upon said remand, without any findings of fact upon such issues and matters made after said remand, and without admission by the Paramount defendants in respect to any such issue or matter, and the Court having considered the matter,

Now, Therefore, Upon Consent of the Parties Hereto, It Is Hereby Ordered, Adjudged and Decreed as follows:

I.

The Complaint is dismissed as to all claims made against the Paramount defendants based upon their acts as producers of motion pictures, whether as individuals or in conjunction with others.

II.

A. The Paramount defendants, their officers, agents, servants and employees are each hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee,

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Plaintiffs' Exhibit No. 10—(Continued)

or through arbitration, or upon the happening of any event or in any manner or by any means.[1]

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

3. From granting any clearance between theatres not in substantial competition.

4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this judgment, the burden shall be upon the distributor to sustain the legality thereof.

5. From further performing any existing franchise to which it is a party and from making any franchises in the future, except for the purpose of enabling an independent exhibitor to operate a theatre in competition with a theatre affiliated with a defendant. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion pic-

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[1]In margin opposite paragraphs 1, 2, 3, 4, 6 and 7: Same as Ex. 7.

Plaintiffs' Exhibit No. 10—(Continued)

ture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.[2]

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal," covering the exhibition of features in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

8. From licensing any feature for exhibition upon any run in any theatre in any other manner

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[2]In margin opposite paragraph 5: Modified Ex. 7.

Plaintiffs' Exhibit No. 10—(Continued)

than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others.

B. If a final judgment be entered in this cause against Loew's Incorporated, Twentieth Century-Fox Film Corporation, and Warner Bros. Pictures, Inc., or any of them, which shall prescribe for any of such defendants provisions for licensing the exhibition of feature motion pictures different from those required by this judgment, the Paramount defendants or the New Picture Company or either or the successor or successors of either, may file herein a written notice of election to be relieved from further compliance with such provisions of this judgment and to comply with such provisions of such judgment against said defendants or any of them, and thereupon an order or supplemental judgment shall be entered on the application of such party or parties so electing, which shall subject such party or parties to such provisions of such other judgment and entitle it or them to the benefits of any terms thereof and relieve it or them from further compliance with such provisions of this judgment.

III.

A. The defendant Paramount Pictures Inc. (hereinafter in this Section III referred to as "Paramount"), its officers, agents, servants and employees are each hereby enjoined:

Plaintiffs' Exhibit No. 10—(Continued)

1. From performing or enforcing agreements referred to in paragraphs A-5 and A-6 of the foregoing section II hereof to which it may be a party.

Filed March 4, 1949, U.S.D.C.

Admitted November 15, 1950.

PLAINTIFFS' EXHIBIT No. 11

District Court of the United States
Southern District of New York

Civil Action No. 87-273

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PARAMOUNT PICTURES, INC., et al.,
Defendants.

MOTION FOR LEAVE TO INTERVENE

Partmar Corporation moves the Court for leave to intervene in this action and to file the annexed petition upon the ground that it is entitled to intervention of right upon the allegations of the attached application for intervention, upon the ground that representation of the applicant's interest by the existing parties may be inadequate and the applicant may be bound by the judgment; and upon the ground that the applicant will be adversely af-

Plaintiffs' Exhibit No. 11—(Continued)

fected by a distribution of property which is subject to the control and disposition of this Court.

JOHN HARLAN AMEN,
Attorney for Applicant.

RUSSELL HARDY,
Of Counsel.

February 23, 1949.

Notice of Motion

United States Attorney, Southern District of New York, United States Court House, New York, N. Y.

Robert L. Wright, Special Assistant to the Attorney General, Washington, D. C.

Whitney North Seymour, care Simpson, Thacher & Bartlett, 120 Broadway, New York, N. Y.

John W. Davis, 15 Broad Street, New York, N. Y.

William J. Donovan, care Donovan, Leisure, Newton & Lumbard, 2 Wall Street, New York, N. Y.

Monroe Goldwater, care Goldwater & Flynn, 60 East 42d Street, New York, N. Y.

Joseph M. Proskauer, 11 Broadway, New York, N. Y.

Richard E. Dwight, care Dwight, Harris, Koegel & Caskey, 100 Broadway, New York, N. Y.

Please take notice that the undersigned will bring the above motion on for hearing before this Court

Plaintiffs' Exhibit No. 11—(Continued)

at Room 506, United States Court House, Borough of Manhattan, City of New York, on March 4, 1949, at 2:30 o'clock p.m. or as soon thereafter as counsel can be heard.

....., John Harlan Amen, Attorney for Appellant.

RUSSELL HARDY, Of Counsel.

This notice, the attached motion and application for intervention served upon the above named persons by delivery of a copy on February 23, 1949.

RUSSELL HARDY.

District Court of the United States
Southern District of New York

Civil Action No. 87-273

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PARAMOUNT PICTURES, INC., et al.,
Defendants.

APPLICATION FOR INTERVENTION

1. The applicant, Partmar Corporation, is a corporation of California. It is engaged in operat-

Plaintiffs' Exhibit No. 11—(Continued)

ing a motion picture theatre in Los Angeles, California, called the Paramount Theatre.

2. The name Paramount Pictures, Inc., will be used in this application to include corporations of which it is the successor, corporations which it controls or has controlled, and corporations with which it has been in privity or may be in privity relative to the Paramount Theatre.

3. The real estate of the Paramount Theatre is owned by Paramount Pictures, Inc. Applicant has leased the theatre from Paramount Pictures, Inc., for a term which will expire on March 18, 1952.

4. By the lease and by another contract with Paramount Pictures, Inc., certain unlawful and monopolistic restraints have been and are now imposed upon applicant relative to the procurement and exhibition of motion pictures.

5. By the judgment of this Court entered in this case on December 31, 1946, and by the decision and mandate of the Supreme Court of the United States, Paramount Pictures, Inc., has been required to cease to enforce said restraints. Because Paramount Pictures, Inc., has been so required to cease to enforce said restraints, and because that prohibition will enable applicant to conduct the business at the Paramount Theatre in a lawful, unrestricted and competitive manner, Paramount Pictures, Inc., has begun, continued, and is now actively engaged in an unlawful attempt to establish,

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Plaintiffs' Exhibit No. 11—(Continued)

continue, resume and practice the same, similar and additional unlawful monopolistic restraints which have been held unlawful and condemned by this Court and by the Supreme Court in this case.

6. Between 1919 and 1923, Paramount Pictures, Inc., acquired interests in three hundred or more motion picture theatres throughout the United States. Thereafter Paramount Pictures, Inc., acquired a large number of additional theatres, including the Paramount Theatre, at Sixth and Hill Streets, Los Angeles, California. These acquisitions were made for the purpose and with the effect of restraining and monopolizing a large part of the business of exhibiting motion pictures, especially in first-run exhibition of feature pictures.

7. Continuously thereafter, until the present time, Paramount Pictures, Inc., has used the Paramount Theatre in Los Angeles as an instrumentality to effectuate the restraints and monopoly.

8. In 1927 and until 1933, Paramount Pictures, Inc., with other defendants in this case and other persons unknown to applicant, entered into so-called pooling agreements by which the Paramount Theatre and other first-run theatres at Los Angeles, normally competitive among themselves, were operated as a unit and for the common and joint benefit of the parties to the agreements. The purpose and result of the agreements was to eliminate competition in and to restrain and monopolize the distribution and exhibition of feature, newsreel and

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Plaintiffs' Exhibit No. 11—(Continued)

short subject motion pictures, first-run in Los Angeles.

9. In 1933 Paramount Pictures, Inc., went into bankruptcy, and the pooling agreements were terminated. Immediately thereafter Paramount Pictures, Inc., offered to lease the Paramount Theatre to applicant. For a long time prior thereto applicant had been desirous of engaging in the business of exhibiting first-run motion pictures at Los Angeles, but had been prevented from doing so by the conspiracy, restraints and monopolization practiced by Paramount Pictures, Inc., and the other defendants. An acceptance of the offer by applicant was, therefore, the only possibility open to applicant to engage in the business. Applicant desired and offered to lease the theatre without the unlawful conditions and restrictions hereinafter stated, but Paramount Pictures, Inc., refused to make a lease without the conditions and restrictions.

10. Applicant accordingly had the choice of leasing and operating the theatre on terms and conditions imposed by Paramount Pictures, Inc., and subject to the conspiracy, restraints and monopolization, or of being unlawfully and wholly excluded from the first-run exhibition business in Los Angeles.

11. On March 3, 1933, Paramount Pictures, Inc., and applicant entered into a lease of the Paramount Theatre to applicant. The lease was granted to

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Plaintiffs' Exhibit No. 11—(Continued)

applicant on the condition that applicant use exclusively in the theatre, feature, newsreel and short subject motion pictures, licensed from Paramount Pictures, Inc. It was a further condition that if applicant should not license Paramount pictures exclusively, the lessor should have the option to cancel and terminate the lease and to evict applicant upon three days' notice.

12. On March 2, 1933, Paramount Pictures, Inc., and applicant entered into a contract which required applicant to license exclusively from Paramount Pictures, Inc., all feature, newsreel and short subject motion pictures to be used in the Paramount Theatre during the term of the lease. The contract required applicant to charge minimum admission prices dictated by Paramount Pictures, Inc. The contract did not require Paramount Pictures, Inc., to furnish pictures exclusively to petitioner.

13. The lease provided that if the contract for pictures should not be performed by petitioner or should be cancelled or terminated by Paramount Pictures, Inc., for any reason, Paramount Pictures, Inc., should have the option to cancel and terminate the lease and to evict applicant on three days' notice. This option was reserved by Paramount Pictures, Inc., for the purpose of enforcing the requirement and condition that applicant should use exclusively in the theatre motion pictures licensed from Paramount Pictures, Inc.

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Plaintiffs' Exhibit No. 11—(Continued)

14. The requirement of the lease and contract for the exclusive use of Paramount pictures was enforced by Paramount Pictures, Inc., and thereby applicant was unlawfully restrained in the procurement of pictures for use at the Paramount Theatre, and was otherwise unlawfully restrained in its property and business. Applicant was required to pay excessive rental for the theatre, excessive license fees to Paramount Pictures, Inc., for the use of pictures; in many instances was required to accept, show and pay for inferior feature pictures; and in many instances was required to pay for short subject motion pictures which it could not and did not, in fact, use.

15. On March 1, 1934, Paramount Pictures, Inc., and applicant entered into a second lease of the Paramount Theatre to applicant, on the same condition and understanding that applicant should use exclusively in the theatre, feature, newsreel and short subject motion pictures licensed from Paramount Pictures, Inc., and on the same further condition and understanding that if applicant should not license pictures exclusively from Paramount Pictures, Inc., the lessor should have the option to cancel and terminate the lease upon three days' notice.

16. The lease also provided that if a contract of the same date between the same parties for the exclusive use of Paramount pictures should not be performed by applicant or should be cancelled or terminated by Paramount Pictures, Inc., for any

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Plaintiffs' Exhibit No. 11—(Continued)

reason, the lessor should have the option to cancel and terminate the lease upon three days' notice. The option was reserved by Paramount Pictures, Inc., for the purpose of enforcing the requirement and condition that applicant should use exclusively in the theatre motion pictures licensed by Paramount Pictures, Inc., and thereby to prevent the unrestricted and competitive operation of the theatre by applicant.

17. On March 1, 1934, the same parties entered into a contract which required applicant to license exclusively from Paramount Pictures, Inc., any and all feature, newsreel and short subject motion pictures used in the Paramount Theatre, and required applicant to charge minimum admission prices dicated by Paramount Pictures, Inc.

18. On August 7, 1934, and October 17, 1935, the same parties entered into further leases of the Paramount Theatre and on August 7, 1934, a contract granting to applicant a license to use Paramount Pictures in the theatre. The leases provided for a term to expire on August 31, 1939, subject to the same conditions stated in the prior leases, that if applicant should not use in the theatre feature, newsreel and short subject motion pictures licensed exclusively from Paramount Pictures, Inc., the lessor should have the option to cancel and terminate the lease and to evict applicant from the theatre prior to August 31, 1939, upon three days' notice.

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Plaintiffs' Exhibit No. 11—(Continued)

19. The contract granting the license for pictures was for the period ending August 31, 1939, and also required applicant to license exclusively from Paramount Pictures, Inc., all feature, newsreel and short subject motion pictures used in the theatre during that period, and also to charge minimum admission prices dictated by Paramount Pictures, Inc.

20. On August 30, 1939, the same parties entered into a further lease of the Paramount Theatre and a further contract granting a license to use Paramount Pictures in the theatre, for a period to expire on August 31, 1949.

21. Applicant requested Paramount Pictures, Inc., to lease the theatre without the requirement for exclusive use of Paramount pictures, but Paramount Pictures, Inc., refused to grant a lease without that requirement. Paramount Pictures, Inc., however, agreed to reduce the requirement for exclusive use of its pictures to one for exclusive use for forty-six weeks per year. But Paramount Pictures, Inc., required that, if, during the remaining six weeks of the year, applicant should avail itself of the privilege of using feature pictures procured elsewhere, it should pay to Paramount Pictures, Inc., $1050.00 for each week. With this exception, the lease was made upon the same condition for exclusive use of Paramount pictures, with the same option in the lessor to evict applicant for failure to comply with that condition. The lease provided that if the contract for pictures (referred to as a

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Plaintiffs' Exhibit No. 11—(Continued)

franchise), should be terminated for any reason whatsoever, the lessor should have the same option.

22. The contract, or franchise, granting the license also made the same requirement for exclusive use of Paramount pictures for forty-six weeks per year. It imposed the same requirement upon applicant to charge minimum admission prices dictated by Paramount Pictures, Inc., during the full term of the lease and contract.

2. All of the aforesaid leases provided for theatre rentals based largely upon a percentage of the gross receipts.

24. On September 1, 1942, the same parties entered into agreements extending the term of the lease and of the so-called franchise, to March 18, 1952, subject to the same conditions and requirements for exclusive use of Paramount pictures for forty-eight weeks per year, and with the same option in the lessor for eviction of petitioner.

25. In all of the leases the option was reserved for the purpose of enforcing the requirement for exclusive use of Paramount pictures, and for the purpose of preventing the unrestricted and competitive operation of the theatre by applicant.

26. At all times the condition and requirement for the exclusive use of Paramount pictures has been enforced by Paramount Pictures, Inc., and thereby applicant has been unlawfully restrained in the procurement and use of pictures at the Para-

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Plaintiffs' Exhibit No. 11—(Continued)

mount Theatre. Applicant has been required by Paramount Pictures, Inc., to pay excessive rentals for the theatre, excessive license charges and fees for the use of Paramount pictures; in many instances has been required to accept, show and pay for inferior feature pictures; and in many instances has been required to pay for short subject motion pictures which it could not and did not, in fact, use.

27. On December 31, 1946, this Court entered a judgment in this case, which provided that Paramount Pictures, Inc., was enjoined from further performing any existing franchise to which it is a party and from making any franchises in the future. The judgment defined the term "franchise" as a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

28. On March 26, 1947, Paramount Pictures, Inc., informed applicant that it had been enjoined from performing the picture franchise by the judgment of this Court and that the franchise was cancelled and terminated as of March 31, 1947.

29. On April 7, 1947, Paramount Pictures, Inc., atempted to exercise the option to evict applicant from the Paramount Theatre, reserved in the lease and franchise, and demanded that applicant remove

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Plaintiffs' Exhibit No. 11—(Continued)

from and vacate the theatre within three days. The demand was made because of the supposition on the part of Paramount Pictures, Inc., that the enforcement of the exclusive use requirement by Paramount Pictures, Inc., had been enjoined by the judgment of this Court.

30. Because applicant desires to conduct the business of exhibiting motion pictures at the Paramount Theatre, without the requirement for the exclusive use of Paramount pictures, and because it believes that requirement to be unlawful and unenforceable, it has refused to remove from the theatre as demanded.

31. On May 1, 1947, Paramount Pictures, Inc., by and through Paramount Pictures Theatres Corporation, filed an action in the District Court of the United States for the Southern District of California, at Los Angeles, to evict applicant from the Paramount Theatre because it is no longer able to enforce the requirement for the exclusive use of Paramount pictures by applicant at that theatre. That action is now pending.

32. That action was filed for the purpose of enabling Paramount Pictures, Inc., to evade and defeat the object of this suit to end the unlawful restraints and monopoly.

33. On May 3, 1948, the Supreme Court of the United States set aside the findings and judgment of this Court relative to franchises, and remanded

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Plaintiffs' Exhibit No. 11—(Continued)

this case for examination by this Court of the problem in the light of the elimination from the judgment of competitive bidding.

34. The case was also remanded to this Court for proceedings and action for divestiture of such of the theatre holdings of the defendants, including Paramount Pictures, Inc., as should be found to have been acquired by or pursuant to unlawful and monopolistic practices, or for the purpose or with the effect of restraining and monopolizing. The Paramount Theatre at Los Angeles was acquired, maintained and used by or pursuant to such practices, and it has been an instrumentality used by Paramount Pictures, Inc., for the purpose and with the effect of maintaining and practicing the restraint and monopoly.

35. Applicant is informed and believes that the plaintiff and Paramount Pictures, Inc., have agreed upon the terms of a final judgment to be entered in this case, without any proceedings or findings by this Court relative to the methods, purpose and effect of the acquisition, maintenance and use of theatres by the defendants, including Paramount Pictures, Inc., and including the Paramount Theatre at Los Angeles, and without requiring a divestiture of the Paramount Theatre pursuant to the mandate of the Supreme Court.

36. Applicant is entitled to intervention of right in this case upon the foregoing allegations, upon

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Plaintiffs' Exhibit No. 11—(Continued)

the fact that if the plaintiff shall agree to such a judgment, and it shall be accepted and entered by this Court, representation of the applicant's interest by the plaintiff will be inadequate and the applicant may be bound by the judgment, and upon the fact that the applicant will be adversely affected by a distribution of property which is subject to the control and disposition of this Court.

Wherefore, applicant prays:

1. That it may be permitted to intervene.

2. That Paramount Pictures, Inc., be enjoined (a) from, directly or indirectly, requiring applicant to use in the Paramount Theatre motion pictures licensed exclusively from Paramount Pictures, Inc.; (b) from instituting or continuing any suit or proceedings for the eviction of applicant from the Paramount Theatre because of the former judgment of this Court prohibiting the enforcement of franchises, or because of the inability of Paramount Pictures, Inc., to enforce the requirement for exclusive use of its pictures in that theatre.

3. That Paramount Pictures, Inc., be ordered to dismiss the suit now pending to evict applicant from the Paramount Theatre.

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Plaintiffs' Exhibit No. 11—(Continued)

4. That Paramount Pictures, Inc., be ordered and directed to divest itself of all interest and ownership, both direct and indirect, in the Paramount Theatre.

JOHN HARLAN AMEN,
Attorney for Applicant.

RUSSELL HARDY,
Of Counsel.

A true copy.

[Seal] /s/ WILLIAM V. CONNELL,
Clerk.

Admitted November 15, 1950.

PLAINTIFFS' EXHIBIT No. 12

United States District Court, Southern District of New York

Equity No. 87-273

UNITED STATES OF AMERICA,
Petitioner,

vs.

PARAMOUNT PICTURES, INC., et al.,
Defendants.

Before: Hon. Augustus N. Hand, C. J.;
Hon. Henry W. Goddard, D. J., and
Hon. Alfred C. Coxe, D. J.

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Plaintiffs' Exhibit No. 12—(Continued)

New York, March 3, 1949; 2:30 o'Clock P.M.

Appearances:

For the Government:

JOHN F. X. McGOHEY, ESQ.,
United States Attorney, By
ROBERT L. WRIGHT, ESQ.,
Special Assistant to the Attorney General, and
HAROLD LASSER, ESQ., and
GEORGE H. DAVIS, JR., ESQ.,
Special Attorneys.

SIMPSON, THACHER & BARTLETT, ESQS.,
Attorneys for Paramount Pictures, Inc., et al;

ALBERT C. BICKFORD, ESQ., and
GEORGE G. GALLANTZ, ESQ.,
Of Counsel. [1002*]

J. ROBERT RUBIN, ESQ., and
DAVIS, POLK, WARDWELL, SUNDERLAND & KIENDL, ESQS.,
Attorneys for Defendants Loew's Incorporated, et al.;

J. ROBERT RUBIN, ESQ.,
HOWARD GILLESPIE, ESQ., and
BENJAMIN MELNIKER, ESQ.,
Of Counsel.

*Page numbering appearing at top of page of original Certified Transcript of Record.

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Plaintiffs' Exhibit No. 12—(Continued)

ROBERT W. PERKINS, ESQ.,
Attorney for Defendants Warner Brothers Pictures, Inc., et al.;
JOSEPH M. PROSKAUER, ESQ.,
Of Counsel.

JAMES F. BYRNES, ESQ., and
DWIGHT, HARRIS, KOEGEL & CASKEY, ESQS.,
Attorneys for Defendants Twentieth Century-Fox Film Corporation, National Theatres Corporation, et al.;

JOHN F. CASKEY, ESQ.,
Of Counsel.

SCHWARTZ & FROHLICH, ESQS.,
Attorneys for Defendant Columbia Pictures Corporation;

LOUIS D. FROHLICH, ESQ.,
ARTHUR M. SCHWARTZ, ESQ.,
EVERETT A. FROHLICH, ESQ.,
IRVING MOROSS, ESQ., and
MAX M. ROSE, ESQ.,
Of Counsel.

CHARLES D. PRUTZMAN, ESQ.,
Attorney for the Universal Defendants;

C. S. LANDAU, ESQ.,
Of Counsel.

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Plaintiffs' Exhibit No. 12—(Continued)

O'BRIEN, DRISCOLL &
RAFTERY, ESQS.,
Attorneys for United Artists;

EDWARD C. RAFTERY, ESQ.,
GEORGE A. RAFTERY, ESQ., and
FREDERICK PRIDE, ESQ.,
Of Counsel. [1003]

AARON LIPPER, ESQ.,
Attorney for Harry Norman Ball;

HYMAN SCHWARTZ, ESQ.,
Of Counsel.

JOHN HARLAN AMEN, ESQ., and
RUSSELL HARDY, ESQ.,
Attorneys for Partmar Corporation.

RUBERT RUBIN, ESQ.,
Attorney for Society of Independent
Motion Picture Producers.

HERMAN S. LEVY, ESQ.,
General Counsel to Theatre Owners
America [1004]

PROCEEDINGS

Judge Hand: I think somebody had better acquaint us with this consent decree. I don't imagine we can understand it unless you do. That is not my suggestion but Judge Coxe's who has come into this proceeding late and he hopes to understand it.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Wright: If your Honor please, I think there is a motion here. That I assumed would be the first order of business. That is, the motion I would suppose would precede the presentation of the decree.

Judge Hand: All right.

Mr. Amen: May it please the Court, I should like to introduce to the Court my Washington associate Mr. Russell Hardy who is a memebr of the District of Columbia bar but not of the New York bar, and ask if you will hear him in support of this motion. He has been very busy with this situation for many years and is more familiar with its details than I am.

Mr. Hardy: If the Court please, may I suggest that perhaps the Government counsel should explain this judgment before I speak about it. Otherwise I shall have to explain it, knowing probably less about it than he knows about it, except with regard to the particular situation that I have in mind. I will do whatever you Honors wish. [1005]

Judge Hand: I assume he would be willing to.

Mr. Wright: Surely. It is a matter entirely in your Honors' convenience.

Judge Hand: All right.

Mr. Hardy: And then may I present my matter at that time?

Judge Hand: Oh, yes.

Mr. Wright: I have here a signed copy of the decree, signed by counsel, which is the one we should

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Plaintiffs' Exhibit No. 12—(Continued)

like to have the Court execute. I understand that each of your Honors was given a copy at the time that the notice was served.

Judge Hand: Yes, I have mine.

Mr. Wright: You each have it.

Judge Hand: I presume in doing this, Mr. Wright, you very likely may want to anticipate the argument to intervene.

Mr. Wright: Well, I hadn't. I hadn't anticipated dealing with the argument to intervene. All I was going to do was to give the factual explanation of what was in the decree.

Judge Hand: I thought you might probably refer to the other when you came to it. Then we will give you all the time you want on each side to talk about it.

Mr. Wright: Well, this decree is a decree [1006] which provides for the divorcement of the Paramount domestic theatre business from the other business of the Paramount Company by the process of a preliminary reorganization subject to stockholder approval, as in the case of the RKO decree, which will result in the formation of a new theatre company to hold the domestic theatre assets, and a new picture company to hold the other assets.

Judge Hand: Have they started their reorganization proceeding in RKO?

Mr. Wright: The RKO stockholders' meeting I believe is now set for March 28th. I understand that proxy statements will go out today to Para-

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Plaintiffs' Exhibit No. 12—(Continued)

mount stockholders with a meeting, or announcing a meeting for some time in the first week of April at which this decree will be presented to the Paramount stockholders. In either case, the decree is not final until approved by the stockholders.

The reorganization in the RKO case, you will recall that the control of the company is in the hands of a single large shareholder, Mr. Howard Hughes, and divorcement in the RKO decree was provided for by requiring that Mr. Hughes either sell or trustee his controlling interest in one of the two new companies after the completion of the organization [1007]

Judge Hand: We saw some papers that he was doing that.

Mr. Wright: Yes. Well, he is required——

Judge Hand: I know he is required.

Mr. Wright: ——under the decree to do it.

Judge Hand: It was in the papers that he was in the course of making some kind of arrangement.

Mr. Wright: Yes. [1008]

Mr. Wright: The Paramount decree presented a somewhat different problem, since we are dealing with a corporation whose stock is very widely held and no single shareholder, I believe, owns as much as one or two per cent.

In this case the technique of assuring separation of the two new companies involves the employment of a trustee similar to the trustees that were used at the time the Reading and Lehigh Valley cases were

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Plaintiffs' Exhibit No. 12—(Continued)

decided, when certain of the coal-carrying railroads were separated from the Pennsylvania Anthracite Coal Mines. That, in substance, provides that the stock of the new theatre company goes to a trustee and the shareholders receive certificates of beneficial interest.

The stock is voted by the trustee. The certificates of beneficial interest become convertible into stock as the owners file an affidavit to the effect that he then has no stock in the picture company.

By that process it is hoped to assure substantially separate ownership of the two companies.

Of course, in so far as control is concerned, there are provisions for separation of management similar to those contained in the RKO decree, and requirements that the boards have a majority of independent directors. [1009]

The trusteeship is, in any event, under this decree, to terminate within a five-year period and at the time of termination the Court will—rather elaborate provisions are contained for keeping continuous track of the beneficial ownership in both the new picture company and new theatre company—at the time of termination, the Court will then examine the ownership to be sure that there is no common or interlocking control at the time of termination. In essence, that is the divorcement plan.

Judge Hand: What does the small stockholder, for instance, get in Paramount?

Mr. Wright: The reorganization plan, I believe,

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Plaintiffs' Exhibit No. 12—(Continued)

contemplates that in return for each share of stock of the parent company, which will be dissolved, he will receive a share in each of the new companies and, as I say, his share in the theatre company will be evidenced by a certificate of interest, the share itself being deposited with the voting trustee.

Judge Hand: Yes.

Mr. Wright: And there are dividend withholding provisions also calculated to accelerate the separation of the ownership of the companies.

Both the new companies will be subject to all of the provisions of your Honors' existing 1946 judgment, [1010] which was affirmed by the Supreme Court. And in the case of the new picture company it would also be subject to an additional provision, which is paragraph 8 of section 2 of this decree, prohibiting discrimination in the licensing of films, requiring that each film be sold picture by picture, and theatre by theatre, upon the basis of competitive merits of the particular theatres, exhibitors and pictures involved. I think you will find that provision is largely in language that was used in your Honors' original 1946 judgment.

Judge Hand: You mean it is more or less of an auction system?

Mr. Wright: No, it doesn't require competitive bidding at all, but it does assure the right of any exhibitor to compete for Paramount films, if he desires to do so, on the basis of the particular operation that he has, the merits of his theatre and himself as an operator.

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Plaintiffs' Exhibit No. 12—(Continued)

Judge Hand: How is he going to get notice?

Mr. Wright: You mean notice of the entry of this decree?

Judge Hand: No, notice of how to bid.

Judge Goddard: How is he going to know about the picture, to bid?

Mr. Wright: I suppose the obligation is [1011] on Paramount to negotiate with whoever desires to negotiate for the run of the film. There are no formal requirements as to how the obligation shall be carried out. I should suppose, of course, that those who wish to compete for a particular run in a particular theatre will let Paramount know about it. I don't think there is any question of notice involved other than the exhibitor's knowing that he has the right under the decree to compete on the basis of the merits of his operation. That is about all that this provision does, is assure him of that right, if he chooses to exercise it. There may or may not be competitive negotiations in a particular instance. It depends, I suppose, wholly on the position that the exhibitors take in the particular situation.

With the exception of that provision, section 2 of the decree which contains the injunction regulating the conduct of the picture business, is exactly the same as that decreed in the 1946 judgment and affirmed by the Supreme Court.

The provisions which deal with the theatre circuit are divided into three sections, the first of which

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Plaintiffs' Exhibit No. 12—(Continued)

deals with the jointly owned theatres. The Paramount circuit is mainly composed of those joint ownerships, and those jointly owned theatres are all [1012] listed here, and Paarmount is given three years in which to complete the dissolution of all of the joint ownerships by which theatres are held between them and independent exhibitors, one-third within one year, two-thirds within two years, or within three years.

Judge Hand: That was the main object of their appeal, wasn't it, their separate appeal? That was one of the main objects, to get rid of that?

Mr. Wright: Yes. I think all of the major defendants objected on their appeals to that.

Judge Hand: I am talking about Paramount. Some of them did not seem to object at all.

Mr. Wright: I think all of the five defendants assigned errors to these provisions of your decree which required a dissolution of the joint ownership.

Judge Hand: Yes, of course, people assign error to everything they can think of. They certainly didn't argue it in the Supreme Court, some of them.

Mr. Wright: That is true.

Judge Hand: And Paramount was the mainly aggrieved party because they were really the mainly affected party.

Mr. Wright: Paramount had the most at stake.

Judge Hand: Yes, that is what I mean.

Mr. Wright: In those provisions. That is quite correct. [1013]

This decree, as I say, accomplishes the dissolu-

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Plaintiffs' Exhibit No. 12—(Continued)

tion of those joint ownerships over this period of time, giving to Paramount a large measure of flexibility in the manner in which the dissolution is to be accomplished. They may either sell out entirely to the partner or they may split assets in accordance with a competitive pattern spelled out in section 3(b) of this judgment. That is the purpose of those limitations, you see, in 3(b), specifying the theatres and towns in which they might convert from the present partial to full ownership, is to see that in no event would Paramount be left in a position where it could dominate film exhibition in those particular communities. The purpose of those provisions is to see that there is no split of assets based on a territorial division between the partner and Paramount, or a split which would, in effect preserve monopoly values.

They are also given the option, in the event that a split or sale to the partner cannot be worked out, to purchase from the partner and resell all of those theatres to independents except such as they are permitted to acquire and retain here to establish this competitive pattern.

Judge Goddard: Mr. Wright, generally speaking, [1014] the present Paramount Corporation will be done away with, and any interest in any theatre would be conveyed to a theatre-owning corporation?

Mr. Wright: That is correct, your Honor. The present Paramount Company will be dissolved in accordance with the reorganization and the entire

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Plaintiffs' Exhibit No. 12—(Continued)

assets split between the two new companies, which means theatres going to the new company and other assets going to the new picture company.

Judge Goddard: Any and all interest in any theatre will be conveyed to the theatre-owning corporation?

Mr. Wright: Yes, with one exception. The Paramount Building here in New York may be retained for a period of, I believe, five years by the picture company but solely as an asset. That is, it will not be operated by them.

Judge Goddard: Well, where will it end up?

Mr. Wright: It will end up in the hands of someone other than Paramount, but that is the only exception to the complete divorcement, and that of course, will ultimately be divorced, but there is a five-year period during which that may be retained.

The other provisions which affect the theatre company, in addition to this dissolution—oh, during the period these joint ownerships are dissolved, the new [1015] theatre company is prohibited from expanding its operations, that is, it may during that period only replace or acquire the theatres that are specified in the decree in the course of these dissolutions of the joint holdings. After that time the new theatre company is subject to the same provision as we have in the RKO decree. There is no acquisition of an additional theatre—of course, replacements are taken care of automatically—without prior court approval.

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Plaintiffs' Exhibit No. 12—(Continued)

The section of the decree dealing with the theatre company also requires the divestiture of theatres which are wholly owned in situations where that divestiture is necessary to open the competition currently closed, first-run situations, and there are about 70 theatres involved in that section, most of which are, I should say, in towns of 25,000 or more, and most of which are first-run theatres, the purpose being to open up first-run competition in those situations where it does exist.

The net effect of all these provisions taken together, I think, is to establish a picture company which will be dependent upon the merit of its product for its success or failure, and to establish a new theatre circuit which will also be in a position where it will have to succeed in a competitive basis and will [1016] not be in a position to monopolize film exhibition in any of the cities where it operates.

Now, if there are any more questions on the decree itself, I will deal with these. Otherwise, I was going——

Judge Hand: What is done with the exercise of leases to the other defendants?

Mr. Wright: Is your Honor referring to theatre leases?

Judge Hand: Yes.

Mr. Wright: So far as I know, there are no——

Judge Hand: And leases also of pictures.

Mr. Wright: There are in this decree no prohibitions against cross-licensing. The decree provides that within one year the picture company and

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Plaintiffs' Exhibit No. 12—(Continued)

the theatre company will be operated separately and under those conditions, we felt it was unnecessary to provide for interim cross-licensing relief, which we think would be necessary if you were going to have a longer period required for separation for freeing the picture company's pictures from control by the theatre company's pictures.

Judge Goddard: There is nothing about arbitration?

Mr. Wright: That is right, your Honor. We have not attempted to deal with arbitration at all. Here [1017] as we see it, the arbitration problem is necessarily a subsidiary one. It is at best merely an enforcement technique that can only be applied after the substantive provisions that are going to affect all these defendants have been determined.

Judge Goddard: That is reserved for further consideration?

Mr. Wright: Oh, yes. Ultimately, I think, there will be some sort of voluntary arbitration that should implement whatever final judgments are entered against all these people.

Judge Coxe: There is some provision that I have seen, I can't find it now, with respect to what is going to happen in the event this case continues in so far as the other defendants are concerned and there is a decision of some kind favorable, or something to change the result accomplished by this, that the Paramount Company could have the benefit of it.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Wright: Yes, that escape clause you are referring to?

Judge Coxe: Yes.

Mr. Wright: That is in section——

Judge Coxe: I don't know whether there are one or two.

Mr. Wright: Section 2 of the judgment provides that [1018] if the remaining major defendants, that is, Fox, Warner and Loew secure a more favorable decree with respect to the film licensing provisions, that Paramount may have the benefit of such provisions.

Judge Coxe: But does that only affect what you have spoken of as licensing?

Mr. Wright: Yes.

Judge Coxe: I thought it was broader than that.

Mr. Wright: I think, in terms, you will find——

Judge Coxe: What section was it, 2?

Mr. Wright: I believe that is at the end of section 2. Page 5, paragraph B.

Judge Coxe: That seems to be confined only to provisions for licensing the exhibition of feature motion pictures.

Mr. Wright: The entire decree operates upon features.

Judge Coxe: I see.

Judge Hand: Well, I don't really understand that, but probably that is because I forget most of what is in our decree and everywhere else. I cannot carry those things in mind along with so much other litigation.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Wright: There is no reason why you [1019] should.

Judge Hand: What does it really mean? I mean, give me an illustration.

Mr. Wright: Well, I should suppose this paragraph 8, that you see immediately above B, is kind of an anti-discrimination provision that we will seek in the final judgment against the remaining defendants in the case, and this provides that if we don't get it, or get a less favorable discrimination provision against Loew, Fox or Warner, that Paramount may have the benefit of that provision.

Judge Hand: Is there anything in that decree or in the Supreme Court's opinion which deals with this particular thing?

Mr. Wright: Yes, the Supreme Court said that, in view of the vacation by it of the competitive bidding system, it would be necessary in any event to have an anti-discrimination provision, and this paragraph 8 has been inserted in response to that express direction. That is the direction which, as we read it, applies to the decrees to be entered against all eight, all of the distributor defendants as such and, as I say, this is the provision which we shall seek against the remaining six distributor defendants. The escape is limited to whatever is entered against the other [1020] three remaining major defendants.

Judge Coxe: But in so far as the dissolution or the divorcement is concerned in the Paramount case, it is not contemplated that at some time, no matter what there may be in a final decree with respect to

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Plaintiffs' Exhibit No. 12—(Continued)

the other defendants, the Paramount Company then might have a right to go back to where they are today.

Mr. Wright: No, there is no escape from the divorcement provision. I might point out that, like the RKO decree, there is——

Judge Coxe: Or go back where I was with them at the time of reorganization, which was a good reorganization and a magnificent job. I thought I would like to throw that bouquet at that reorganization. [1021]

Mr. Wright: I assume that it was. This does contemplate another reorganization, though, which will supersede that one permanently.

Judge Coxe: That goes for the lawyers' fees too.

Mr. Wright: I don't think there is any question but what the reorganization here contemplated is intended permanently to supersede the bankruptcy reorganization. I think if your Honors had in mind some defensive reintegration—of course, it is true that neither this decree nor the RKO decree prevents a new picture company from acquiring theatres, by anything that is in the decree. That would be whatever position they are under general law with respect to any activity of that kind.

Judge Coxe: You are making them get rid of the Paramount Theatre uptown.

Mr. Wright: This does permanently separate——

Judge Coxe: The one Mr. Thas spoke about. You perhaps don't recall that.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Wright: I am sorry, I don't, your Honor.

Judge Coxe: I shouldn't have mentioned it.

Mr. Wright: I would like to hear more. This does permanently separate the existing Paramount Theatre Circuit from the Paramount Picture Company.

Judge Coxe: I understand. [1022]

Judge Hand: Well, what about the intervention?

Mr. Wright: Well, our position, of course, on this intervention is precisely what it was in the Supreme Court in this case and what it was before Judge Goddard three years ago when similar attempts were made. I don't think there is any question but what these people who seek to intervene don't have standing to do so. In so far as being heard, of course, we have no objection to anyone who wishes to draw attention to any of the asserted defects in this decree telling your Honors what they think they are.

We don't, however, concede the right of anyone to come in as a party and litigate the question of what should or should not be done in this situation.

Judge Coxe: Well, what is the practical effect of intervention such as this in this case other than the fact that the papers have to be served on the attorneys?

Mr. Wright: The practical effect of intervention if you permitted them to come in as parties, I suppose would be to make impossible the settlement of any of these controversies by consent. You would

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Plaintiffs' Exhibit No. 12—(Continued)

I suppose have the interminable litigation that we are seeking to avoid by these consent decrees.

I suppose the position of these people is [1023] that if we pursued as they say we ought to pursue all of the possible avenues of relief which the Supreme Court has offered us, that we might at some future date wind up with a good deal more drastic relief than we have here—the divestiture of many more theatres. But the assumption on which we make this consent judgment of this kind, and, of course we think a proper one, is that the relief now obtainable, the general benefit to the industry as a whole, justifies us in foregoing the pressing of every ultimate avenue of relief that is open to us.

Judge Hand: What do these people really want as you understand it?

Mr. Wright: Well, as I understand it, they say in effect that we should have required Paramount to divest itself of certain theatres which are not required to be divested. And that is, I suppose, a question of judgment, one, as to whether or not the facts on which they rely could be established and, two, if they were established, whether such relief would automatically follow and, three, even so, whether the additional litigation that would be required to get that relief would justify the time and effort required to do it, and foregoing the relief that is now available. That is a question of judgment—— [1024]

Judge Hand: Is it any different in substance

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Plaintiffs' Exhibit No. 12—(Continued)

from all the denials? All the independents that were denied the right to intervene during this litigation?

Mr. Wright: I don't think it is, your Honor, no.

Judge Hand: I don't see that it is, but, of course, we have to hear what they have to say and make up our minds after that.

Mr. Wright: That we have no objection to your hearing anyone who wishes to express himself as to the merits or demerits of any part of this judgment.

Judge Coxe: I am afraid I don't understand exactly what your answer was to my question.

Mr. Wright: I beg your pardon.

Judge Coxe: Namely, what particular advantage do you conceive that they would get by being allowed to intervene.

Mr. Wright: Well, the advantage that they would get I suppose is that they don't have—they are not interested as we are——

Judge Coxe: Assuming that they can be heard at any time, certainly this afternoon.

Mr. Wright: Yes. Well, I suppose that if they could actually become parties they would prevent us from terminating the litigation as to Paramount by consent [1025] and would compel us to pursue the avenues of relief which they say are open up to the point where a theatre which they are interested in would be divested and they would have a chance to buy it. I suppose that is what is at stake.

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Plaintiffs' Exhibit No. 12—(Continued)

Judge Coxe: You think there is a chance they would be able to do that?

Mr. Wright: It certainly is conceivable, if we prolong this litigation long enough some of those other things might happen. I can't say.

Judge Coxe: We might not any of us be here.

Judge Hand: Or even our successors.

Judge Goddard: At one point you said the intervener wanted time to dispose of more theatres and I understood you to say that Paramount was to dispose of any and all theatres——

Mr. Wright: Well, I think the difference is in the meaning of disposition. Of course, the divorcement does not actually deprive Paramount of any asset it has now; none whatsoever. What he is talking about when he says "divestiture" is the actual sale of a theatre asset to an outsider, to an independent exhibitor, such as we have provided in the case of some of these theatres that are in here where it is necessary to open up competition in towns in which the new theatre company [1026] might otherwise dominate.

Judge Goddard: All right.

Judge Hand: Well, we will hear from the attorney for the intervener.

Mr. Bickford: Judge Hand, might I be heard a moment on the Paramount situation?

Judge Hand: All right.

Mr. Bickford: There isn't much that I can add to what Mr. Wright has said in his very fair statement of what this decree provides.

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Plaintiffs' Exhibit No. 12—(Continued)

However, I did want to call your Honor's attention particularly to section 9 of the decree appearing at page 66, which has three very important provisions. One is that this decree will entirely supersede the decree which this Court entered on December 31, 1946, which was affirmed in part and reversed in part by the Supreme Court.

The second is that this judgment which we are asking you to enter now will have no force and effect unless it is approved by the Paramount stockholders at the meeting called especially for that purpose, and the decree provides in that section that if stockholder approval is not obtained by April 19, 1949, then the case is to be restored to the docket, the judgment is no longer in effect, and there will be a trial of the [1027] issues.

I might tell you that the stockholders' meeting is called for April 12th. The notices will go out on March 7th with a full and complete description of the decree and the plan of reorganization, which the stockholders will be asked to approve, and I wanted to call that to your Honor's attention because there is a possibility that this stockholder approval may not be obtained, and then this decree which we are asking you to enter will not be in force.

Now the other provision of section 9 which I think is of importance and particularly to your Honors is that both sides waive the convening of the statutory court and consent that any further orders in this case may be heard in the regular

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Plaintiffs' Exhibit No. 12—(Continued)

motion part by any judge of this district. So that this court so far as the function of this decree is concerned will be functus officio after stockholder approval.

Judge Hand: What about the RKO decree in that respect?

Mr. Bickford: That I believe has the same provision.

Mr. Wright: That is right, your Honor.

Mr. Bickford: Now with respect to the motion for intervention, I don't want to anticipate [1028] entirely Mr. Hardy's argument but I have an affidavit which I would like to submit to the Court and give a copy to Mr. Hardy in opposition to that motion. We oppose it, as, of course, Mr. Wright has opposed it, and want to point out that if the intervention is granted then this consent decree cannot go into effect, and that the proposed interveners will have the right to appeal and take the case back to the Supreme Court and there may be a long trial of the issues in the event that they seek to present evidence here, as to the alleged wrongful acquisition by Paramount or maintenance by Paramount of a single theatre in Los Angeles which has been leased to the proposed interveners by Paramount since 1933.

Now there is a suit pending in California involving that theatre, a suit between Paramount and these proposed interveners. That case is at issue and is being vigorously prosecuted. It was pointed out to your Honors in the argument in this case

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before that case was pending, and I think all the issues can be disposed of there, and they should be disposed of there, and not to interrupt the orderly process in this court by permitting the intervention.

I would like to reserve a moment or two after Mr. Hardy has spoken, if there is anything that he says [1029] that I think should be answered. But this decree or judgment which we are now asking your Honors to sign is the product of a great deal of work and a great deal of thought on behalf of the Government and the Paramount officials and attorneys. We believe that it is a good decree from the standpoint of both sides to end the litigation between these parties, and we ask your Honors to sign it.

Mr. Lipper: May I respectfully move the admission of Hyman Schwartz of the Pennsylvania Bar who would like to be heard on several provisions that affect Pennsylvania interests.

Mr. Louis Frohlich: Your Honor, may I be heard before any intervener? I am a party here, and I have two objections to the decree that I wanted to mention. I wanted to point out two things to the Court. One is that this decree prevents any defendant from ever purchasing a theatre owned by Paramount.

Now Mr. Raftery is going to argue on that. I am with him. Columbia-United Artists want to be free in the future if they have to purchase theatres. In order to live they want to be able to purchase

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Plaintiffs' Exhibit No. 12—(Continued)

any theatre in the country. They own no theatres now. There is no danger of any monopoly, but at least this decree prevents that process, but particularly I want [3020] to call the Court's attention to paragraph 8 on page 3, that provision which Judge Hand pointed out and Mr. Wright looked at about the compulsory competitive bidding, coming in through the back door. Well, I think it is. It does two things which violate the Supreme Court decision. It brings back compulsory bidding—compulsory competitive bidding, and it destroys the right of any defendant to sell pictures in a group, not to block book upon condition, which this Court has condemned and which the Supreme Court has sustained the condemnation of, but this Court was always careful to say that Columbia or any other defendant could sell a group of pictures providing it didn't condition and make the exhibitor buy one or more pictures as a condition for getting the group. That is not block booking within the meaning of this decision. And the Supreme Court was careful to point that out, too.

Now here we come to section 8 which says in effect that that may not be done. It says all you can do is take each picture and offer it to each theatre. That goes far beyond block booking which is condemned. It prevents anybody, any exhibitor from purchasing from Paramount more than one picture. The exhibitor may say "I want to purchase six of your pictures." It cannot do it under

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this decree. The exhibitor may have three or four theatres and say, "I want to purchase one [1031] Paramount picture for each theatre as a group." It cannot be done. What the Government has done here is that it has broadened this Court's decision on block booking and has taken away the additional feature which made it illegal, and now completely prevents the sale of pictures in groups. That violates not only this Court's decision but the United States Supreme Court's decision. So that it has brought in once more compulsory bidding which the Court rejected, and it has broadened the scope of the block booking so as to make any kind of sale of a group illegal. I think that before this Court comes to consider the signing of the decree it should consider seriously the deletion of paragraph 8.

Judge Hand: Is Mr. Raftery here?

Mr. Frohlich: Yes, Mr. Raftery is here and will address the Court with your Honors' permission.

Mr. Bickford: May I answer that particular thing, your Honor?

Judge Hand: Well, let us see what Mr. Raftery has to say.

Mr. Raftery: May it please the Court, that Section 8 is not in the RKO consent decree that Mr. Frohlich is talking about. They stopped destroying RKO after 7, but with Paramount they threw another hook at them and put 8 in there. [1032]

Now our objection to the decree, and Universal feels the same way about it, and so does Columbia,

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is that Mr. Wright is procuring by indirection an injunction against the Little Three negotiating or trying to buy any one of these Paramount theatres. Now it may be after this complete wreck is accomplished and these theatres are on the market, that in self-preservation we might decide in a competitive situation that we would want to buy a theatre.

Now in your Honors' original judgment and in the relief the Government is seeking against us, they are only seeking to enjoin particular practices that they claim are illegal in distribution, but by enjoining the Paramount from talking to us on these theatres they have eliminated the Little Three as potential customers.

Any other circuit in the country with 50 or 60 or 70 or a hundred theatres can bid for these Paramount theatres, but United Artists, Columbia and Universal are left out.

Now the entire thing can be cured by the insertion of one word, and I think that is what the Government had in mind.

If your Honors will turn to paragraph A on page 38. I think that is the first time that occurs. It is the sixth line in that paragraph. They restrict [1033] the right to transfer these various interests to a third person who is not a defendant herein. Now I am sure that what they had in mind originally following your Honor's original decision and Mr. Justice Douglas' decision, was that that should have read, "who is not an exhibitor defendant herein." If you remember, your Honors in paragraph 2 of the origi-

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nal decree granted relief against the major defendants. Then in the next paragraph, 3, when you came to talk about the others, you left the Little Three out and your provisions were against exhibitor defendants.

Now if they would insert the word "exhibitor" before the word "defendants" in about a half dozen places that I have cited in this short memorandum, I would have nothing more to say about this decree because I look upon it as a private contract between the Government and Paramount.

As I understand it, the Attorney General is supposed to be representing the people in this proceeding. After hearing Mr. Wright I have my doubts about the latter, but nevertheless I would like to submit this proposed memorandum on the proposed changes merely to insert the word "exhibitor" and let the Little Three go back to right field where they have been since this case began. [1034]

Mr. Frohlich: And may I submit my memorandum to your Honors?

Mr. Landau: Your Honors, I speak for Universal. I join with Mr. Raftery in what he has said and I would also like to point out that up to this very time it has been the position of counsel for the Government on a number of occasions in discussing this general question, that not only did counsel not object to any of the Little Three acquiring theatres from time to time, but they would welcome it on the theory that the acquisition of any such theatres would promote competition between any one of the Little Three and the individual major

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Plaintiffs' Exhibit No. 12—(Continued)

defendants. Now that was the position of counsel for the Government from as early as 1946 up to the present time.

The Court: What do you say to that, Mr. Wright?

Mr. Wright: If your Honor please, this suggestion comes as a complete surprise to me because the very same limitation that is in this decree was in the RKO decree which was presented last November, and none of these people ever suggested to me prior to today when I was served with this notice in the hall as I came in here that this provision was one which they felt affected them in any substantial way.

Now the purpose of the provision is very [1035] plain. The language is in there not by inadvertence at all but by design. The theory on which these theatres are to be divested is that they were used as a part of a conspiracy to which these gentlemen's clients were parties. They are co-conspirators with those who are being divested of the theatres. There would in our view be no merit whatsoever in having any of these defendants transfer these theatres from one to another. It would be utterly inconsistent with the fundamental theory of the lawsuit, and I should suppose that they have no more vested right to be considered as potential purchasers of Paramount theatres than anyone else in the country.

I don't see any basis whatsoever for their asserting a special claim to a right to purchase a Paramount theatre.

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Plaintiffs' Exhibit No. 12—(Continued)

Insofar as the purchase of theatres is the general issue, so far as their activities are concerned this decree, of course, says nothing whatsoever. It only controls the disposition by Paramount of its property.

Mr. Raftery: Of course, your Honors, with RKO, Mr. Wright got that by us. We didn't discover it. If we had discovered it last November we would have been in with the same plea. We discovered it this week when we got this Paramount decree, and when we see something [1036] as far-reaching as this, where what Judge Coxe created in the reorganization is striken down and thrown to the winds, we want to know about it. We may have to get into the theatre business.

Judge Hand: Don't depress him any more. He may want to intervene.

Mr. Raftery: We are not intervening.

Judge Hand: I say Judge Coxe will want to intervene.

Judge Coxe: That is the last thing I would want to do as far as I am concerned.

Mr. Raftery: The proposition we are interested in is that this issue has not been tried. Here is something by indirection getting into a decree against the Little Three, and we say we have a perfect right at law in respect to that. Mr. Wright in his answer I think to one of your Honors' questions said that the new Paramount Picture Company is under no restraint to go out and acquire

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Plaintiffs' Exhibit No. 12—(Continued)

theatres in the future provided it does it according to existing law.

Judge Hand: What is this section you are referring to now?

Mr. Raftery: Section A on page 38. Where it says, "with the right to sell to third persons not a defendant in this action." [1037]

Judge Hand: I hardly see how it could do any harm to anybody to let you three people get into this. They say they did this very deliberately, though, and you have no right in this respect.

Mr. Raftery: Well, we have a right in this action. For instance, suppose in a consent decree Paramount comes along and agrees with the Government that subdivision (a), for example, shall be applicable to United Artists. Now that is exactly what is done here. They have by consenting to a decree against themselves consented to one which in effect is a decree against United Artists, against Columbia and against Universal.

Judge Hand: I don't see particularly how there can be advantage to the Government with this provision.

Mr. Raftery: I don't.

Judge Hand: But I don't see how you have any standing to object.

Mr. Raftery: But it happens to operate directly against three defendants who are parties to this action.

Judge Hand: Suppose they said they couldn't sell to any particular class of persons: Could that

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Plaintiffs' Exhibit No. 12—(Continued)

class come in here and object to such a provision? They couldn't if they were not parties. I don't see how [1038] they can merely because they are.

Mr. Raftery: Well, that may be true but I don't follow it. I think in any consent decree they can consent to anything that affects their own rights but I don't see how they can consent to something that affects us.

The Paramount Theatre Company will have six or seven hundred theatres. We can't bid for any theatres that are in the open market with anybody else. I think that is a complete deprivation of our rights by indirection and I think on that we have a perfect right to be heard and I don't think the Attorney General has a right to deprive us of our rights by consent.

Now I say he is not representing the interests of the people whom he is supposed to represent when he comes in here and just takes three companies and by indirection deprives us of a very substantial right. On that point I think Mr. Wright overstepped. When I say Mr. Wright, I mean those in charge of consent decrees.

Judge Hand: You don't own any theatres?

Mr. Raftery: No.

Judge Hand: He doesn't want them, I suppose, to be in a position of being in the picture and not the other——

Mr. Raftery: Well, I don't think the Attorney General in his wildest claims has ever claimed that

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Plaintiffs' Exhibit No. 12—(Continued)

a distributor-producer hasn't the right to own a limited number of theatres under certain conditions provided he is not in a monopolistic position or doesn't violate any provisions of the Sherman Act.

Judge Hand: Well, of course, you are in the position where you have. Whether we were right or wrong that was what we so decided and that has been affirmed by the Supreme Court.

Mr. Raftery: Not in any question involved in Section 3. We weren't in Section 3 in the beginning. We weren't in Section 3 after Mr. Justice Douglas' affirmance. We are for the first time now being put into Section 3 by a consent decree. The restraints alleged were in Section 2, both in the original decree entered by your Honors in December, 1946, and in the opinion of Mr. Justice Douglas. And we submit that on this we are being deprived of a very substantial right.

Judge Hand: What have you to say, Mr. Bickford?

Mr. Bickford: I just wanted to answer Mr. Frohlich's argument on Section 8 of this decree, that that section compels competitive bidding. It doesn't at all, and the Government and Paramount are wholly in accord on that. It has nothing whatsoever to do with compulsory competitive bidding which is the thing the Supreme Court [1040] disapproved of in your earlier decree.

Judge Hand: Yes. It is not so. It is a thousand miles from it.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Bickford: The words "picture by picture" do not appear in Section 8, and a reading of Section 7, just before it, shows that it contemplates pictures may be sold differently. You may sell a block of pictures. You may sell a lot of pictures together. So that part of his argument that it compels picture by picture by picture sale is not so.

Judge Hand: That is not in this.

Mr. Bickford: That is not in the decree. Of course, block booking is out, too, though another provision in the decree, the same provision that was in your original decree. You can't condition the sale of one copyrighted feature on the sale of another.

Now, so far as the buyer wants more than one picture, he can get it, but that does not compel competitive bidding.

Mr. Frohlich: Well, may I say that I dispute that sharply. That is an issue between us right now because there is nothing in this decree, Judge Hand, which permits, as Mr. Bickford says, the sale or purchase of a group of pictures. This section 8 expressly prevents it. It was slipped in here to broaden the [1041] original block booking against which I argued so strenuously. And furthermore I want to point this out to your Honors: This decree which went up to the United States Supreme Court affected the rights of exhibitors as well as the rights of these defendants. Judge Arnold and Colonel Barton came into this court and sought to intervene.

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Plaintiffs' Exhibit No. 12—(Continued)

They were denied that right. They appealed to the Supreme Court and they argued to the Supreme Court for intervention mainly upon the ground that they did not want competitive bidding in the industry because the great majority of the exhibitors were opposed to it. Now the Supreme Court while it upheld this Court's order did so upon the ground that it had stricken out competitive bidding, and it said in plain English, "Since we have stricken out competitive bidding you don't have to come in and intervene any more; your rights have been protected." The Supreme Court was careful in its discussion of competitive bidding, and I read that carefully again only this morning. I pointed out how exhibitors, especially the great mass of independent exhibitors were harmed and injured by that practice. They felt that they were being put in a very unfavorable economic position by competitive bidding. The Supreme Court said so a half dozen times. Now they are going to be put back in that position by paragraph 8, and I [1042] say that the Attorney General——

Judge Hand: On page 8?

Mr. Frohlich: Page 5, paragraph 8. The Government has no right, it has no authority to defy the Supreme Court as it is doing. Paramount has no right to do it, and I am sure that they are not asking this Court to do the gracious thing when they are asking this Court to put a provision in here in this decree which defies, contradicts and is at variance with the well-considered opinion of the

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Plaintiffs' Exhibit No. 12—(Continued)

Supreme Court. That is what they are doing and they have no right to do it.

Judge Hand: Well, I don't see how 8 has the effect you say it does.

Mr. Frohlich: Well, 8 says that Paramount has to take every picture in every theatre and license it separately and offer it that way; no safeguard as to how it is to be done. It is a clause—I will tell you now: It is not easily understood and I would like to have this Court ask Mr. Wright just what it means because he was asked what it meant and he couldn't tell. Tell him, Mr. Wright.

Mr. Wright: Since this is your Honor's language, I suppose I really ought to pass that back to you, but as I have considered it, this came from the original 1946 opinion. Of course, it now has to be interpreted [1043] in the context of the Supreme Court's opinion and the language means, as I see it, this—first, before I get to that: Mr. Frohlich told you that the provision in the old decree about licensing one or more pictures isn't here. That is not so. Paragraph 7 is in here intact. That is one concerning groups of more than one and certain cancellation privileges allowed. In other words, this decree is identical with the 1946 decree except for 8. 8, as I understand it, is intended to guarantee to the exhibitor the right to compete for the picture, that Paramount distributes each picture on the merits of the particular operation that he has, his theatre and himself as an exhibitor and the kind of picture

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Plaintiffs' Exhibit No. 12—(Continued)

that is being licensed. That is all that the section does. It doesn't compel anyone to bid.

Judge Goddard: Does this prevent them from offering ten pictures at one time?

Mr. Wright: Oh, in a competitive situation, I suppose it is implicit in any scheme of avoiding discrimination between exhibtor A and exhibitor B in seeking the run of a feature. Obviously you can only resolve a contest of that kind in terms of a particular feature that is desired.

Judge Goddard: That is not my question. I am saying there is nothing in this section 8 which would prevent the offering of ten pictures?

Mr. Wright: That is correct.

Judge Goddard: Each one to be considered singly, separate?

Mr. Wright: Quite right. [1044]

Mr. Wright: 10 or 50, the only requirement is that when it comes to determining who shall receive what feature, on what run, that shall be determined upon the——

Judge Goddard: Picture by picture.

Mr. Wright: Picture by picture and theatre by theatre.

Judge Goddard: So, if there were other people in the field, you might get down to determining it picture by picture and the man might have no right to make a trade to buy eight.

Mr. Wright: Yes, conceivably a discrimination might result from saying to one, "Here is an eight

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Plaintiffs' Exhibit No. 12—(Continued)

picture deal," and to the other fellow, "A one picture deal," the fellow who is trying to compete with it.

Judge Hand: We will hear you.

Mr. Schwartz: May it please the Court, I appear for a client named Ball who is the owner of a theatre, only an exhibitor, in Ambridge, Pennsylvania, right outside of Pittsburgh.

My client has a judgment, finally as the result of a mandate of the Court of Appeals for the Third Circuit, against Paramount and some of the other defendants in this case before your Honors. That is a judgment as the result of a private suit to instituted for injunctive relief for violation of the antitrust laws. [1045]

I appear for him today because, in our opinion, our interests are directly affected by this decree in that this decree refers to a theatre in Ambridge, Pennsylvania, which is the subject matter of that particular suit, and that is the State Theatre in Ambridge, Pennsylvania, which appears in the list of theatres contained in the proposed decree at page 27. In order for me to convey to your Honors how our interests are affected, I must perforce refer to the opinion of the Court of Appeals in the Third Circuit, which establishes these facts, implemented by the judgment now entered pursuant to that mandate. The facts are these: my client bought the theatre back in 1944. The theatre had previously been owned 50 per cent by Paramount and 50 per cent by another exhibitor.

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Plaintiffs' Exhibit No. 12—(Continued)

The theatre had been licensed for many years prior to that time for the exhibition of Paramount film and film of the other distributors.

Immediately upon the purchase of the theatre by my client, who purchased the physical building, the operators of the theatre, to wit, Paramount 50 per cent and the other owners 50 per cent, bought a garage down the street and remodeled that into another theatre, right down the street in Asbury.

They shut us down for two years. We could [sic] not get any product. The licenses which we had had up to that time to exhibit the film of those distributors were terminated and the sun was moved right over to the other theatre, newly created as the result of what the Court of Appeals determined to be a conspiracy.

We were able to open up after two years, getting a very small amount of product. Meanwhile the suit we had started went along and, finally, in July of last year, after the decree of this Court and after the disposition of that decree by the Supreme Court, in July of last year, as I say, the Court of Appeals in our circuit gave us a judgment, directed the district court to enter a form of decree, and as say we were entitled to a decree, and leaving the form of it for formulation by the district court. The form of that decree is now pending again in the Court of Appeals on appeal and cross-appeals by all parties, plaintiffs and defendants and today we are here, but we feel duty bound to acquaint

Plaintiffs' Exhibit No. 12—(Continued)

your Honors with the situation because the decree before your Honors today actually tampers with our rights, and we feel, therefore, duty bound to tell your Honors so, for several reasons. First of all, because our own interests are affected; secondly, there may be other exhibitors who, whether they have caught decrees in their favor or not, may still find themselves in the [1047] same position and who may wish to have your Honors' ear but who did not have notice of this proceeding today; and finally, because, unless something is done in the decree before your Honors today with respect to situations such as my client finds himself in, your Honors will, because of sheer unfamiliarity with the facts, not be able to point to a decree which is your Honors' handiwork, and your Honors must accept responsibility therefor.

Therefore, I say to you, in all seriousness, I feel duty bound, not only to my client, but to your Honors to tell you of this situation.

Whether we are permitted to intervene, as Judge Coxe indicated, I think, is of no particular consequence. We are here and your Honors have graciously allowed us to be heard. We have a motion to present, if it is acceptable, for leave to file a printed brief in support of the few remarks I am permitted to say this afternoon. I say, whether that is done by intervention or whether just by graciousness of your Honors is of no particular importance right now. We do feel, however, that your

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Plaintiffs' Exhibit No. 12—(Continued)

Honors should know that here is a situation judicially determined as a final judgment. No certiorari was filed. A petition for rehearing was filed but denied by the Court of Appeals for the Third [1048] Circuit. And we represent, therefore, to your Honors that that is the law of that particular case, and in that case our rights with respect to exhibition in Ambridge, particularly with respect to the State Theatre in Ambridge, a Paramount theatre mentioned in this decree, our rights are directly involved, and that is why I am here before your Honors this afternoon.

Judge Hand: What rights have you been given by that decree?

Mr. Schwartz: The decree as entered, subsequent to the mandate of the Court of Appeals, gave us what we consider inadequate rights. They gave us the right to negotiate. We urged before the district court and are now urging before the Court of Appeals that we are entitled, not only to negotiate, that is, to the right to negotiate for pictures, but that under the facts as there set forth in the Court of Appeals decision, we have a peculiar situation there, we have a situation which falls within the language of the Supreme Court in the Paramount case, in the Schine case, in the Griffith, in the Crescent case, which falls within the language of the Court of Appeals in the Bigelow case in Chicago, to wit, that where there is a conspiracy which has hatched or spawned something, the Supreme Court refers to it as an illegal fruit, that under those

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Plaintiffs' Exhibit No. 12—(Continued)

circumstances, [1049] not only must the conspiracy be stopped, but that the decree must go further and must eliminate the conspiracy root, branch and all its evil fruits.

Now, as a practical matter, we are faced with this situation: we own a theatre in Ambridge; we were shut down by an admitted conspiracy, designed to put us out of business, a conspiracy which spawned or hatched a new theatre right down the street from us. The Court of Appeals said that was illegal, said that was conspiratorial, and gave us a judgment.

Judge Hand: For what?

Mr. Schwartz: The Court of Appeals said——

Judge Hand: To do what?

Mr. Schwartz: The Court of Appeals said we were entitled to a judgment for two things, first, for damages, the amount to be left for determination by the lower court, and, secondly, for injunctive relief, the form of relief to be determined by the district court. That form of relief has not yet been finally determined because, as I say, a decree was entered from which appeals have been taken by all parties, defendants as well as plaintiff.

Judge Hand: Yes, you told me that. What do you suggest?

Mr. Schwartz: We suggest, sir, that that is a [1050] situation which is a fact of this problem before your Honors but which this decree takes no consideration of.

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Plaintiffs' Exhibit No. 12—(Continued)

As a matter of fact, what this decree says is that Paramount may continue to own that very theatre for perhaps three years. This litigation that I speak of started back in 1944.

Judge Hand: Never mind. And then what, if they do own it for three years?

Mr. Schwartz: We will be out of business long before that, and that is exactly what the Court of Appeals pointed out in its opinion, that here was a designed conspiracy to put us out of business. We will be out of business long before then.

Judge Hand: What relief did they give you? They gave you damages?

Mr. Schwartz: They gave us the right to damages, to be determined later. That we haven't yet been able to fix, those damages.

This case that I speak of is typical of any number of cases which are referred to in what is perhaps the most recent pronouncement by the Congress of the United States on this very problem. Perhaps your Honors have not yet had occasion to familiarize yourselves with it. It is the report of the Snell Business Committee, just issued last month, in which this Court's decree and [1051] opinion in the motion picture industry as a whole, and in which the general antitrust laws are discussed, and in that report of the Congress, of that committee of the Congress, there is a reference to the fact that in the case of these individual exhibitors who do not have unlimited funds or resources, even though theoretically

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Plaintiffs' Exhibit No. 12—(Continued)

they may have a remedy under the antitrust laws, practically, that remedy does not exist because by the time they get their remedy, they are bled white, in the language of the report.

We are faced here with a situation where for four years we have litigated——

Judge Hand: I know that. You have said that before. What do you want us to do?

Mr. Schwartz: I suggest, sir, that since this present decree before your Honors is this Court's decree, not a private agreement between parties at all, it is this Court's decree, I suggest to your Honors that before your Honors affix your judicial sanction to that decree, your Honors make provision for cases like Ball, for cases where not only is it necessary for your Honors to stop or break up the conspiracy from this point on, but, in the language of the Supreme Court, to undo the wrongs that have been done.

In our case specifically, and this may apply [1052] to any number of other cases which may be all over the country for all we know, but in our case specifically, to undo the wrong that has been done must necessarily contemplate that that creature of the conspiracy, in the language of the Court, be destroyed; that is to say, if that is not done, then what happens is this: Paramount sells its interest in that theatre to its co-conspirator, another defendant in our case, not a defendant in this case before your Honors, but a defendant in our case, Paramount reaps the result of its conspiracy, it

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Plaintiffs' Exhibit No. 12—(Continued)

gets paid in money for what it has violated the antitrust laws to create, in the language of the Supreme Court, and this co-conspirator in our case continues to own an asset which is the illegal fruit of the judicially determined conspiracy. That is the result of your Honors' signing this decree in its present form. That is why we are here this afternoon, to tell your Honors that.

The least that we could hope to do is ask your Honors to eliminate reference to the State Theatre from this decree. We think your Honors should go further because, as has been pointed out by other counsel, the Attorney General here represents the people, not just an individual private litigant, as I do, he represents the people. Your Honors here have [1053] a mandate from the people to protect their rights, and we say to your Honors that while I am only interested personally in one situation, perhaps your Honors should take means of finding out, through the Attorney General's office or otherwise, about other situations and to make proper provision for them in this decree.

So that we say to your Honors, in the first place, the minimum that we should ask is that any reference to our case or our situation be deleted from this decree. Otherwise we are faced with a danger of Paramount and its co-conspirator coming into our case and saying, "Here is a judicial precedent. You cannot touch us now for three years." We personally are faced with that danger if this decree is signed in its present form.

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Plaintiffs' Exhibit No. 12—(Continued)

We say to your Honors that even if your Honors exclude——

The Court: What do you mean by "cannot touch us for three years"?

Mr. Schwartz: Because, under this decree, Paramount is not required to divest for three years, as to this particular theatre.

Judge Hand: What do you want them to do? Do you want them to divest——

Mr. Schwartz: We most certainly do, sir. [1054]

Judge Hand: Wait a minute. Divest to whom?

Mr. Schwartz: We want them not only to divest but we want them to make restitution, in the language of the Supreme Court in the Schine case, we want them to make equitable restitution for the illegal gains with which they are now possessed, to wit, the ownership of an asset. And the only way we can think of is to close down that theatre, and we are asking the Circuit Court to do that. Whether we will be successful remains for future determination by the Court of Appeals in our circuit but at the moment we are urging that position on the Court which has sustained our right to relief and has not blueprinted the precise form of relief and which, therefore, will have that problem before it.

Judge Hand: Now, Mr. Wright, are you familiar with the situation?

Mr. Wright: Yes, if the Court please, I am familiar with the suit. We have followed it, and I

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Plaintiffs' Exhibit No. 12—(Continued)

might say that this, of course, is only one of a very large number of private litigations that are going on all over the country which inpinge in various ways on this suit.

We have, of course, been conscious of all these various claims and we have been extraordinarily careful not to prejudice any of them in anything that we have [1055] done in this decree.

There is nothing in this decree which prevents Mr. Schwartz or Mr. Hardy from asserting in their respective litigations any rights they may have whatsoever against the defendant here.

There is no provision they can point to, in my judgment, which would have any such effect.

It would be, I suppose, a helpful thing to these litigants if, instead of having to bear the burden of their own litigation, we could, in this suit, take care of and adjust every equity between an injured exhibitor and one of these defendants that exists. Well, when that could be done, I have no idea, of how long it would take, but it isn't possible. There has to be some cut-off between the concept of this, that is, some differentiation between the concept of this suit as one to improve conditions in the industry generally and to help independent exhibitors in general——

Judge Hand: Of course.

Mr. Wright: ——and one which would give specific relief.

Judge Hand: I suppose Paramount would disappear in this reorganization, wouldn't it?

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Wright: The present defendant company.

Judge Hand: Yes. [1056]

Mr. Wright: Well, it will merge as two new companies.

But let us look at this particular situation.

Judge Hand: What rights would he have in this situation? I can imagine what rights he would have, but I would like to have you state them.

Mr. Wright: I should suppose that he has rights in his suit to pursue whatever remedy he has against either Notopoulos, who is the partner. This is a joint situation, an exhibitor named Notopoulos has 50 per cent and Paramount has 50 per cent.

The disposition we made in the decree was to require Paramount to get out. They have three years to do it. They don't have the privilege of acquiring this State Theatre or any of the other theatres in that town of Ambridge, that he is talking about. They do have three years in which to do it.

Judge Hand: He apparently wants them to get out and make some restitution following the claim which he hasn't yet established.

Mr. Wright: His right to restitution is, I suppose, entirely dependent upon the decision of the Pittsburgh District Court and the Third Circuit Court of Appeals, where he is conducting his litigation, and there is nothing in this disposition that has been [1057] made here which could in any way bar him from any restitution or any relief to which he may be entitled in that proceeding.

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Plaintiffs' Exhibit No. 12—(Continued)

And the same thing applies to Mr. Hardy's proceeding and applies to any of these private litigations which are now pending. Their complaint is, as I see it, really not that anything we have done here exactly hampers them from getting the relief they say they deserve, the complaint is, in effect, that we ourselves have affirmatively undertaken to provide it in this suit. That undertaking is just outside the scope of the suit, in the first place. In a situation such as this, Notopoulos isn't even a party. There is no jurisdiction over him whatsoever.

Mr. Schwartz: May I respectfully ask leave of your Honors to submit a brief in printed or typed form, as your Honors determine, documenting some of the things I have said?

Judge Hand: Yes.

Mr. Schwartz: Thank you, sir.

Mr. Bickford: Your Honor, may I just say a word? I think Mr. Wright has correctly set forth the position with respect to this motion by Mr. Schwartz. There is nothing in this decree which can affect his rights in the suit there. [1058]

Now, Mr. Schwartz has, perhaps, inadvertently made a lot of misstatements with respect to that situation. I am not fully familiar with all those facts. I would like to ask your Honors if I could call upon Mr. Caskey, who has been all through that, to answer Mr. Schwartz's contention. I simply say I agree with Mr. Wright, that he has no standing here, that this decree cannot affect his rights in

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Plaintiffs' Exhibit No. 12—(Continued)

the suit, that what he wants he is getting here, we have to get out of town, we have to get rid of the theatre, but he wants you to order the theatre shut for him, and I don't think this Court should be asked to go around shutting theatres.

Judge Hand: What?

Mr. Bickford: He wants you to order the theatre shut, and I don't think this Court should be asked to go around closing theatres.

Mr. Caskey is here.

Mr. Caskey: I really don't know if the Court wants to hear about this litigation in the Third Circuit but the essence of the matter is simply this: Paramount and Notopoulos had a theatre which was in competition with two theatres of Warner's for first run. Plaintiff or his nominee bought the lease, the fee from underneath Paramount, and, so, Paramount and Notopoulos constructed [1059] a better theatre in Ambridge. Then there came the usual controversy about licensing of the pictures first run, and it was the plaintiff's contention that he was entitled to all of the pictures that had theretofore played in the Paramount-Notopoulos theatre.

The case was tried before the district court. Judge Schoonmaker died in the middle of the trial. Judge Gibson took it up. Judgment was for the defendant. The Circuit Court of Appeals reversed. Went back to Judge Gibson for a decree. Judge Gibson entered the decree in the identical form as was entered in the Goldman case, which compelled the defendants

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Plaintiffs' Exhibit No. 12—(Continued)

to offer their pictures on a competitive basis to all-comers.

Plaintiff hasn't been able to survive in the competition, and that is all there is, although they have taken an appeal to the Court of Appeals to try to set aside Judge Gibson's decree following the mandate of the Circuit Court of Appeals, and I assume the matter will be argued down there next month.

Judge Hand: What are they asking for, really?

Mr. Caskey: This is the first I have heard that they were asking to have the theatre closed, but what their complaint is, that in competing with the better Warner theatres and the better new Paramount State Theatre, they aren't able to get the motion pictures [1060] they want at the price they say they should be allowed to pay for them. What the form of their argument in the Circuit Court of Appeals will be, I don't know.

Judge Hand: I don't think we can take your brief on this subject. We will note that you have no standing.

Mr. Schwartz: May I suggest this, that Mr. Wright and Mr. Caskey and the others who spoke have treated this matter before as a private suit. It is true I am here because of private, selfish interest, but I have a right to point out to your Honors that this is not an issue before your Honors now of private litigation. This is a matter of determining——

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The Court: I know, you pointed that out many times, and it is undoubtedly a fact, but we cannot attempt to make provisions for these people who have lawsuits outside. We are not going to do it.

Mr. Schwartz: I thought, in asking permission to submit a brief to your Honors, it would avoid taking the time necessary to call to your Honors' attention, perhaps, language which, as it is read does not particularly register as applicable to our case, but which we consider, in the light of the facts of our case, illustrates the necessity of a court of this nature making provision, not for us as private [1061] litigants, but for the general welfare of the people in a situation of this sort. And here again I refer to the exact language of the Congress in its latest report, a part of which I would like to submit in my brief.

Judge Coxe: What is that, the 80th Congress?

Mr. Schwartz: It is the Second Session, sir, of the 80th Congress. And the language in the report epitomizes our position. It is this, "That the anti-trust laws are of vital importance to our republican form of government in two respects, first"——

Judge Hand: Don't read generously. We don't want to hear any more.

Mr. Schwartz: Well, that is why I asked for leave to submit——

Judge Hand: No, we are not going to receive it.

Mr. Levy: My name is Herman S. Levy. I am general counsel to Theatre Owners of America. I

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Plaintiffs' Exhibit No. 12—(Continued)

was here in 1946 as amicus curiae for the predecessor group. I would like one minute of time, and my attention is directed, naturally, to subsection 8 of paragraph 5, as to which there has already been considerable discussion, and that is, as to whether the language in that subsection decrees compulsory competitive bidding. We are not here saying that the distributor may not use competitive bidding, and legally. [1062] We are opposed to this, or suggest opposition to it, if this means compulsory competitive bidding, which was decreed by this Court, and then discarded by the Supreme Court.

There is, obviously, honest difference of opinion here this afternoon by Mr. Frohlich and Mr. Wright and others. Personally, it is difficult for me to understand how any feature must mean one picture—it doesn't say any feature or features—how any one picture may be licensed theatre by theatre unless it is on a competitive basis.

If Paramount, by Section 8, or the new Paramount, is required to license any feature theatre by theatre, it seems to me it is ipso facto compulsory competitive bidding, and this is part of an injunction restraining Paramount from licensing its pictures any other way, and so we suggest to the Court, in reading this subsection 8, if the Court finds that this language is justification for requiring compulsory competitive bidding only, that a rewording of the language be suggested.

Mr. Russell Hardy: If the Court please, I repre-

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Plaintiffs' Exhibit No. 12—(Continued)

sent a small corporation that leases a theatre in Los Angeles from Paramount Pictures, Inc., and one of its subsidiaries. We ask to intervene in this case to [1063] show that we will be seriously prejudiced and injured by this proposed judgment for two principal reasons which I shall undertake to develop, first, because the proposed judgment contains provisions which will be used in Los Angeles to continue, instead of to dissolve, this restraint of trade and monopoly; and, secondly, because this judgment does not conform to the mandate of the Supreme Court, and, if it did, it would help us, it would relieve us from the restraint of trade and monopoly dealt with in this suit.

Judge Hand: I don't suppose it has to conform. It cannot create new monopolies that are forbidden, I should suppose. That may be what you are aiming at, but this is an adjustment. This is entirely outside of our decree and the Supreme Court decision and Judge Goddard's former orders and setup and everything.

Mr. Hardy: I think that is certainly true. As I have read and studied this judgment, that is certainly true. I think, however, that with respect to an application to intervene, that is of very great importance, the question of whether or not this Court ought not to receive this intervention when a decree is proposed which does not follow the mandate of that Court, and where, if such a decree had been proposed following the mandate of that Court,

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Plaintiffs' Exhibit No. 12—(Continued)

we would have been relieved of these [1064] monopolies, we would have been liberated from the concentration camp of this monopoly in which we have been imprisoned for many years.

Judge Hand: Tell me what it does that you object to.

Mr. Hardy: Well, if I may develop it, I have that in my argument, if I may develop the background and lead up to that, I think it will be much more intelligent.

As I say, this corporation, Partmar, leases a theatre in Los Angeles from Paramount on a lease which expires in 1952. It has but a short three years yet to run. We have been leasing that theatre for 16 years from these people, since 1933, at a time when they were in bankruptcy, and we have been a good and profitable tenant for them.

Eviction proceedings have been brought against us in Los Angeles based upon the former decree of this Court, and they will be supported and strengthened. I fear, if this judgment shall be entered without the changes which I shall suggest.

When we entered into this business in Los Angeles 16 years ago no one could enter into that business, particularly in the first-run business, except at the will of these parties and except at the will particularly [1065] of Paramount. We could not get pictures, no one could get pictures, except upon terms and conditions imposed by them. They had built a Chinese wall around that city and many

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Plaintiffs' Exhibit No. 12—(Continued)

other cities and no one could get in there except at the portal which they guarded and on their terms. I daresay they exercised a control over this business greater than was within the power of the United States Government or any other government in this country.

So we had to submit to their conditions if we entered the business, if we leased that theatre, and those conditions were these: that we use their pictures exclusively, features, newsreels and short subject pictures 52 weeks a year. We did not want that kind of condition. We wanted to have permission to buy pictures where we could. That requirement was not stated in the lease. It was stated in a contract called a franchise, that was contemporaneous with the lease and ran along with the lease and expired with the lease, and we had, during those 16 years, successive leases and successive contemporaneous franchises.

Judge Hand: As I remember it, that was held invalid under our decision.

Mr. Hardy: Yes.

Judge Hand: All right. Now what? [1066]

Mr. Hardy: Those franchises contained a requirement that we buy our pictures exclusively from them, an exclusive dealing requirement; that we charge the admission prices dictated by them. Latterly we persuaded them to liberalize the franchise so that we would have to take their pictures for only 48 weeks a year, but when they gave us

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Plaintiffs' Exhibit No. 12—(Continued)

that great liberty they provided that if we bought anybody else's pictures we should pay them $1050 a week. They never enforced that penalty because, in many instances, they could not furnish pictures for the 52 weeks, but it was there, and if it was legal, it was enforceable, and it was pressure on us always.

The lease contained an option to the lessor to terminate it, as they put it, for any reason whatsoever. One of the reasons was, if a franchise should be cancelled and terminated.

Judge Hand: If it is such a bad lease, why do you object to being dispossessed?

Mr. Hardy: That is the only way a person could be in this business, if it did, in a first-run situation, was subject to their terms and conditions.

We don't object to being dispossessed if we are upon the eve of a condition where we will no longer be subjected to those restraints. What we complain about [1067] is that when this day dawns, when your Honors, this Court and the Supreme Court, have condemned these exclusive dealings and restrictive contracts——

Judge Hand: There is no doubt about that.

Mr. Hardy: Sir?

Judge Hand: There is no doubt about that.

Mr. Hardy: When that day comes, this is a different time, I hope, then we don't want to be evicted, we want to get the few remaining years where we can enjoy non-monopoly and non-restraint of trade, and that is why we object.

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Plaintiffs' Exhibit No. 12—(Continued)

So, as I say, it contained this option to evict us if the franchise should be cancelled for any reason whatsoever on three days' notice.

When this Court entered the judgment prohibiting the performance of franchise, they demanded their theatre, and we refused to give it to them. We took the position that they were wrongdoers, attempting to make use of their own wrongful conduct. They gave us a three days' notice. They brought an eviction proceeding in a court at Los Angeles. In that proceeding they made this fundamental and necessary allegation, that this Court had cancelled the franchise because of illegality and that the lease provided that if the franchise should be cancelled, they should have the option to recover the [1068] theatre, and that illegality and cancellation of the franchise made the option operative and, therefore, they exercised it. Ergo, we are entitled to the theatre. We answered that they were wrongdoers asking a court of equity for relief based upon their own wrongdoing and that they intended to evict us because they were no longer able to enforce those restrictive and monopolistic provisions, and they intended to evict us in order that they might re-establish that or a similar situation and, therefore, defeat the purpose of this judgment, certainly, in spirit and effect.

We have a leasehold interest, therefore, a leasehold estate in this theatre, of which we are to be divested by the use of this judgment and by the force of this judgment, and because this judgment

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Plaintiffs' Exhibit No. 12—(Continued)

has been entered, the intervention rule provides that, as a matter of right, we shall have a right to intervene in such a case.

This Court at this moment is dealing with this property. This divestiture decree and these transfers of property dealt with in this decree are such dispositions as are referred to in the intervention rule.

The judgment of this Court with regard to franchises, which was the basis of the eviction suit in Los Angeles, was reversed by the Supreme Court and [1069] it seemed to me, therefore, that the basis of their lawsuit vanished, but they have persisted in the suit. It is still pending. The Court there has refused to grant us—to dismiss it, and I am very much afraid that when we get back there, particularly after the judgment of this Court, if this Court shall accept this judgment, that we will be evicted, and we will be evicted erroneously. We may be able to take an appeal, we are not rich people, and that may be the end of the story for us. We are being sued for treble damages under the California statute for holding over after their notice of eviction. We may not be able to get a supersedeas bond, and that may be the end of the story for us, and we will be another dead business, destroyed by this monopoly and destroyed by the use of the judgment which these people ask this Court to give them today.

The Supreme Court thought that people in our

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Plaintiffs' Exhibit No. 12—(Continued)

situation had a very important interest, a very important status in this lawsuit. Listen to this melancholy recapitulation of the Supreme Court in that opinion:

"The trade victims of this conspiracy have, in large measure, been the small independent operators. They are the ones that have felt most keenly the discriminatory practices and predatory activities in which the defendants have freely [1070] indulged. They have been the victims of the mass purchasing power of the larger units in the industry. It is largely out of the ruins of the small operators that the large empires of exhibitors have been built."

Now, unless we can get the assistance of this Court, we will simply be added as another victim to those ruins.

When the Supreme Court decided this case, we had renewed hope, particularly in connection with the divestiture features, that we would be saved and that there would be an effectual dissolution entered in this case, that there would be an injunction against enforcing exclusive dealing contracts by any means, by any methods, particularly by eviction of the tenant who had a theatre and bought pictures on that basis.

And one of the things we shall ask this Court, if we are permitted to intervene, is to add to this judgment such an injunction that we shall be permitted to prove what we urge in our proposed complaint.

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Plaintiffs' Exhibit No. 12—(Continued)

The possession, use and transfer and disposition of this theatre, as I have said, are subject to the judgment of this Court, and I am sure there isn't anything that we shall ask that is not within the purview of this judgment. And the proper remedy that ought to be made in this case is in para materia and certainly necessary. [1071]

This theatre, of which we are the lessee, is to be transferred by virtue of this judgment. If this Court may do that at the instance of these parties, certainly it may place appropriate conditions upon the transfer and appropriate limitations upon the transferor and the transferee.

This judgment, as I said, strengthens Paramount in this eviction suit against us, and if they shall succeed, we will be eliminated. We will be eliminated because we have been liberated so that we may compete, so that we may conduct an independent enterprise there.

Certainly it was never intended, certainly it is repugnant to the spirit of any judgment that ought to be entered here, to nip that competition in the bud, and, if it is, this judgment will be used in that case to defeat the purpose and effect of the judgment.

I have no doubt there must be many other similar cases. I venture the belief that Paramount and these other companies haven't leased a theatre to an independent operator except with such an exclusive dealing requirement plus the eviction clause to enforce it. I don't know; the Department

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Plaintiffs' Exhibit No. 12—(Continued)

of Justice probably knows, it ought to know, it has been investigating this situation for, lo, these 30 years or more, and [1072] I venture to say that their files are loaded with such instances.

What do I ask specifically? On pages 4 and 5 of this proposed judgment, paragraphs 7 and 8, which may be referred to as the anti-block booking provisions, which prohibit the sale of one picture conditioned upon another, can be extended. Your Honors can add a few words there to take care of the situation. Block booking is an exclusive dealing practice. I suggest that, in connection with that prohibition, there should be appropriate words to prohibit the enforcement of that by any method, including the eviction of lessees from theatres because it cannot be enforced. [1073]

On page 64 there is a comprehensive provision.

Judge Goddard: What is it you seek? Do you suggest that the penalties be severe?

Mr. Hardy: I am sorry.

Judge Goddard: What do you suggest there? This prohibits——

Mr. Hardy: That prohibits block booking which I say is entirely immaterial, or the same as exclusive dealing, the requirement to buy a company's pictures exclusively. I suggest that there should be added to that a statement to the effect that block booking shall not be enforced by any method including eviction of a tenant because of the inability legally to continue such provision.

Judge Hand: This absolutely prevents any li-

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Plaintiffs' Exhibit No. 12—(Continued)

cense of one feature conditioned upon the licensees taking one or more. It absolutely prohibits that.

Mr. Hardy: Well, take this franchise, it contains the exclusive dealing requirement. Just as soon as that franchise was enjoined they immediately, you see, use the eviction option, and they protest, of course, and say, "We are not evicting you because we can't force you to take our pictures, because we are no longer able to dictate your admission price; we are just evicting you because the franchise has been cancelled [1074] and that is a provision in the lease."

Now if there is anything in inference and belief, because the franchise was cancelled and the franchise is exclusive dealing, that is the only reason why they made the franchise.

As I say, I referred to a provision on page 64 at the bottom of the page, paragraph A. That provides that Paramount shall not be limited in its right to license pictures, or in any way to provide for the exhibition of any or all of the motion pictures which it may distribute in such manner and upon such terms and subject to such conditions as may be satisfactory to it in any theatre in which Paramount Pictures, Inc., has or may acquire pursuant to the terms of this judgment a proprietary interest. That right they are to have for a year or until the completion of this reorganization.

Now that is the most comprehensive right and certainly includes the right to enforce an exclusive dealing contract and to back it up with the eviction

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Plaintiffs' Exhibit No. 12—(Continued)

of a party who refuses to buy all of its pictures from them.

I say that that certainly should be qualified in the manner that I suggested with regard to the other provisions, to prevent the use of that to force an exhibitor to buy pictures exclusively from them or to defeat the anti-block booking provision, and to make it [1075] absolutely certain that this Court does not intend that they shall do that by any method, by eviction or otherwise.

Judge Hand: I don't see how they are doing it by eviction. You don't connect it with block booking.

Judge Goddard: That is the penalty you propose isn't it, eviction?

Mr. Hardy: No. What I propose is that they shall not have the power to evict a tenant, to evict a purchaser of pictures because they are unable to enforce the contract to make him buy all of his pictures from them.

The franchise situation is just the same as the situation in the shoe machinery case where the Shoe Machinery Company leased its shoe manufacturing machines on the condition that the lessee should take machines exclusively from them or buy the materials that are used exclusively from them, and if you didn't buy your machinery exclusively——

Judge Hand: It is like the old Datoyden case. But let us not get into that. We are perfectly familiar with that. What have you got to say to this, Mr. Bickford?

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Bickford: I have quite a lot to say, your Honor. [1076]

The Court: All right. I think we have heard about enough.

Mr. Hardy: If your Honor please, I have another branch to this argument that I would like to develop. I think I can dispose of it in about five minutes.

Judge Hand: All right.

Mr. Hardy: Partmar is prejudiced in perpetuity and more fundamentally by the provisions of this decree with regard to divestiture, first, because this judgment permits a gigantic combination of theatres. This judgment will permit, will create the biggest aggregation of theatres in the world. It will be anywhere from 500 to 600 theatres, now, dependent upon how these parties use certain rights under this decree. It may rise to a thousand or more.

Now that is contrary to the mandate of the Supreme Court. The Supreme Court laid down the principle of divestiture in this case, and that was that where a theatre had been acquired, maintained or used by monopoly or monopolistic methods, it should be divested.

Now this decree does not apply that at all, and because it doesn't apply that, I think we are grossly injured. [1077]

So I think that these theatres dealt with by the judgment of this Court and by the opinion of the Supreme Court can be divided into three classes.

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First, those theatres which were joint interest between defendants, secondly, those which were joint interest between the defendants and independents, and thirdly, what the Supreme Court calls the fruits of monopoly. That third group includes theatres which were acquired, maintained or used by monopolistic methods. This court dealt with the first two categories.

The Government complained because it hadn't dealt with the third category and hadn't divested that category, and they went to the Supreme Court. The Supreme Court sent it back here to deal with that category, to have further proceedings to ascertain what theatres were in that category of fruits of monopoly and to have those theatres divested.

The Supreme Court said this: "To the extent that these acquisitions were the fruits of monopolistic practices or restraints of trade they should be divested. Ownership is vulnerable and a suit by the United States under the Sherman Act if the property was acquired or a strategic position maintained as a result of practices which constitute unreasonable restraints of trade"——

Judge Hand: That is what the people [1078] were agreeing to do with the Government.

Mr. Hardy: No, sir, that is precisely what they are not agreeing to do.

Judge Hand: All right. I am afraid they think they are.

Mr. Hardy: I would like to show your Honors

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Plaintiffs' Exhibit No. 12—(Continued)

why I think they are not doing it. They say in this judgment that they are not doing it. On page 2 they say the Paramount defendants have consented to the entry of this judgment after the taking of evidence upon the remand of this cause by the Supreme Court to this court, but without rendition of any decision by this court upon any of the issues and matters which were to be determined upon said remand, without any findings of fact upon such issues, and matters made after said remand and without admission by the Paramount defendants in respect to any issue or matter, and the court having considered the matter, and so forth, and then it goes on with their plan.

I say all it does is to transfer, first get rid of these two categories of joint interest, and it transfers the rest of the theatres to a new theatre corporation, and I say that that new theatre corporation will start with probably 600 and end with a thousand or more theatres. [1079]

The Supreme Court said that that should be done but that this court should ascertain what theatres were the fruits of monopoly over and above the joint interest theatres, and have those divested, and the Department of Justice came back to this court armed with the principle of remedy and it said in October, 1928, in this document filed in this court, the Government's proposed findings and judgment——

Judge Hand: You mean 1948.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Hardy: 1948, yes, sir. The Government's proposed findings and judgment with the supporting memorandum, on page 5——

Judge Hand: Well, I have no doubt that they said different things in here. That is unnecessary to a consent decree.

Mr. Hardy: Now they come here and they surrender that. They have given that up. Instead of applying the principle of divestiture pronounced by the Supreme Court, mainly, acquisition, maintenance and use by monopolistic methods they have substituted the principle of negotiation and agreement, and they in effect have sat down with Paramount and negotiated, and they have got up minus what the Supreme Court gave them.

My study of this judgment leads me to believe that they have less in that judgment when—that they [1080] have less in that judgment than they had when they went before this court.

Judge Hand: We can tell you that it is very difficult to tell what the Supreme Court did. They merely passed it back and said, "Do best to us."

Mr. Hardy: They certainly laid down this principle of divestiture based upon acquisition, maintenance and use.

Judge Hand: I think we had better hear the opposition.

Mr. Bickford: I can be very brief, your Honor. I think that many of the things just said to you in this argument should never have been said. It was really what seems to be, and I hate to say it,

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Plaintiffs' Exhibit No. 12—(Continued)

a deliberate effort to mislead you as to what this decree did or intends to do, and as to what the status of these proposed intervenors is. They say they are poor people and if you sign this decree they will be out of business. They are the same ones who tried to intervene here before under the name of the St. Louis Amusement Company. They are a large circuit of 30 or more theatres in St. Louis; one in San Francisco and one in Los Angeles. They have been operating this theatre in Los Angeles and drawing the fat on it since 1933 when they got a lease from Paramount after Paramount went into bankruptcy. Paramount [1081] built the theatre. Paramount owned the building. And all that Paramount is now doing is bringing suit against them out there to get back their property according to the contract which these people made in 1933, and voluntarily renewed from time to time since that period.

There is no question of oppression, and I challenge Mr. Hardy to show you any evidence of any oppression in this situation here, in any of the situations that he referred to that might be found in the files of the Government in Washington.

Judge Hand: What he says is that you wouldn't have done it if you never continue these agreements and franchises.

Mr. Bickford: Now we deny that. We wanted the theatre back and we are bringing suit out there to get the theatre back, and all that Mr. Hardy is trying to do now is to get you to try in some way

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Plaintiffs' Exhibit No. 12—(Continued)

to make some decision here which will give him an advantage in the suit in California where he is faced with a motion for summary judgment at this present time—a motion brought by them and a countermotion by Paramount which is pending before that court and the whole thing will be disposed of there.

Judge Hand: It will probably be denied on the ground that you had to have a full trial with [1082] findings.

Mr. Bickford: Well, simply on the question of law, where the question before you is whether they have a right to intervene, this court has decided and the Supreme Court has supported it by refusal of writs of certiorari in two instances that a person in this situation—in fact, the same person here, has no standing to intervene, and that is the same situation now. So I ask that the motion be denied.

Mr. Hardy: If your Honor please, I accept the challenge of Mr. Bickford to show whether there has been any oppression in this instance. That is precisely what I am asking for. I am asking for the opportunity to prove what we have alleged.

Judge Hand: I don't think you are likely to be allowed to intervene here. Nobody has been yet. There have been a great many representations that people might be affected, and they might be affected. We can't provide for all those outside litigations. There would never be any consent decree or probably if it were to deal with an omnibus decree, there wouldn't be any omnibus decree.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Hardy: I don't ask your Honors to do that. You misunderstand me, if you think I do. I ask your Honors to put something in this decree which is appropriate to put in there, namely, to qualify statements in there [1083] saying that may not be used against us. I don't want this court to decide that case out there. I want this court, and I think I have a right to ask this court to make it impossible to use that decree to beat us over the head. I ask this Court to write a decree here which they cannot use as an economic legend on us in some other court, and the qualifications that I ask are appropriate and they certainly ought to be in there.

Mr. Proskauer: Your Honor, may I inquire whether there is any claim here for a general intervention, or does it relate only to this consent decree?

Mr. Hardy: No. I am only interested and I think I have a right only to be interested in the situation at Los Angeles with regard to this particular theatre.

Mr. Proskauer: Do I understand the gentleman to say that he is not asking general intervention which would in any way affect Warner Bros.?

Mr. Hardy: That is right.

Mr. Proskauer: All right. Then I have nothing to say. If you answered the other way, I would have had considerable to say. This gentleman is the one who played the arbitration provisions up to the hilt.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Hardy: Well, is that to be used against me? I hope not, your Honor. [1084]

Mr. Rubin: My name is Robert J. Rubin. I am general counsel for the Society of Independent Motion Picture Producers and I would like to state at the outset that any resemblance between my name and Mr. J. Robert Rubin, my friend, in the language of our business is purely coincidental.

I will take but a very few moments of your Honors' time. It has been a long session.

I do feel that one or two matters should be called to your Honors' attention, and perhaps it will come as a fresh breath of air to indicate that I come not to bury Mr. Wright or the decree entirely but in part to praise a portion of it.

We feel a substantial contribution has been made in so far as the disintegration provisions of the decree are concerned. We feel that the decree which is now in paper form when it is fully implemented will result in increased competition and oftentimes, unfortunately these decrees of divestiture do not, as we know them, always result in increased competition in this phase of the business.

My particular concern, the concern of the producers whom I represent lies in the creation of the new picture company and the numbers of theatres of which that will be composed. [1085]

The Society of Independent Motion Picture Producers is composed of individuals such as Mr. Goldwyn, Mr. Walt Disney, Mr. David O. Selznick, and Mr. Edward Small, and others, who do not own

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Plaintiffs' Exhibit No. 12—(Continued)

theatres but who make possibly two or three pictures a year and sell their pictures picture by picture to the various circuits throughout the country and the various other exhibitors.

This case from the very inception has in my view unfortunately taken on the case of an exhibitor case, a case in which the Attorney General representing the people, and I verily believe that he does that very thing, has been emphasizing constantly both in the evidence and in the argument the necessity for protection of independent exhibitors.

The Society filed an amicus brief before the Supreme Court and before this Court at the time it was before your Honors previously, in which the other side of the coin was presented, and I simply feel that inasmuch as this decree is going to be entered in the context of all of these remarks and in the light of these conversations, lest silence be assent on behalf of the independent producers, it behooves me to make these comments.

The other side of the picture is this: That while disintegration of large theatre holdings, of [1086] theatre circuit, would operate to prevent discrimination against the independent exhibitors, the existence of that self-same power and that self-same integration and concentration operates directly against the independent producers in an even more disastrous fashion.

We have asserted in our brief and we assert now that we have been deprived not of product, as in

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Plaintiffs' Exhibit No. 12—(Continued)

the case of the exhibitor; we don't need the prod-
uct, we produce it; but we have been denied acces
to the screens of the country, and we asserted and
assert that to the extent that concentration of buy-
ing power in these large circuits is diminished, t
that self-same extent, that power to discriminat
against producers and independent producers wh
are supplying products to those circuits, to tha
extent it is lessened.

Our concern lies in this: that this decree brings
into being a new creature, the new picture com-
pany, which starts presumably fresh without the
long history of all the practices which have been
condemned by this and the Supreme Court, starts
with a circuit of approximately 600 theatres more
or less. There are provisions against the new dis-
tributing company requiring them to sell picture
by picture, and I believe that is necessary. It will
make for a more competitive system, which we hope
these proceedings will result in. There is nothing
in the decree restraining [1087] the buying activi-
ties of this new circuit, which is by far larger than
any now existing.

As your Honors know, in the Schine case there
are some 125 theatres which the Government is
vigorously prosecuting and seeking complete dis-
integration of. We have a circuit created of some
600 here, and my concern and our concern is unless
we express ourselves, even though the Court may
or may not modify the provisions of this decree,
that the imprimatur of this Court giving approval

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Plaintiffs' Exhibit No. 12—(Continued)

to this decree will thereby place the stamp of approval upon the creation and existence of circuits of that size. We feel that such concentration of buying power is contrary not only to the provisions of your Honors' decision in this case but specifically the language of the Supreme Court. The independent producers who sell to these circuits are at the mercy of the self-same entities that the independent exhibitors are and who have been in the forefront of this case since its inception.

This case is not over. There are pending litigations possibly on matters to be ultimately decided on the issues of this case. We know there will be interpretations of this decree. We also know that this decree is meaningful only in so far as it is complied with and enforced by the Government. And we feel [1088] that we must express our objections and deplore the creation of a circuit of this size without adequate provision that will compel them to buy pictures individually. This can be accomplished by some generic language that would impose upon them the necessity to buy pictures theatre by theatre without the necessity of relitigating all of these facts. Such a provision would result in compelling them to buy their pictures, whether from affiliates, whether from independent producers distributing to these other major distributing companies, on a fair and competitive basis without combining some 600-odd theatres, which, of course, would result in those practices which

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Plaintiffs' Exhibit No. 12—(Continued)

your Honors have taken cognizance of in this particular case.

Just one further point and I will conclude. Again this is the other side of the coin. The Government apparently in consenting to this judgment has made an effort, and I believe a very substantial effort to open up competitive situations throughout the country.

As I understand it, when this case is completed both as to this defendant and the others, there will be no closed situation. There will be substantial independent first-run exhibition competition. We trust that there will be.

Insofar as the provisions of this decree [1089] with respect to opening up such competition are concerned, your Honors will note the letter that accompanies the decree. And I believe that the provisions of this decree with respect to those theatres enumerated rest upon the representation of Paramount in the attached letter, the significance of which certainly cannot be denied at all. If opinion differs regarding the representation, then we feel the department should come in and make or apply for such modification as is necessary.

The independent producer is concerned not so much with the immediate competitive area of a particular theatre as it relates to another affiliated or an independent exhibitor. Those are arguments that your Honors have heard this afternoon, and that has been the subject of many arguments heretofore.

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Plaintiffs' Exhibit No. 12—(Continued)

We have the additional burden. Our burden, if your Honors please, is to sell those pictures not with respect to the theatre down the street in competition with one across the river. We have to sell our pictures nationally to theatres in all possible situations in this country and we submit that that is a problem that does not beset the independent exhibitor. It besets us because we must use distributing companies to distribute our pictures. The independent exhibitor is concerned with [1090] his immediate competitor. We are concerned with supplying the product to outlets wherever they may exist.

We say that the distinction between the problems besetting the independent exhibitor and ourselves lies in this fact: that here we create a 600-some odd theatre circuit. Exhibit A does not care whether or not there are 649 scattered about the country. All he cares about is the terms afforded to the house he is competing with and that there is no concentration of power directed against him.

We must therefore raise our objection at this time to the creation of such a circuit. I don't know if it will modify your Honor's opinion as to whether or not this decree should be signed or not; probably not; but we feel that the record should be complete. So we state that A, we deplore the creation of such a large circuit. We feel that such a circuit under no circumstances should or must consider itself purged of any of the condemned practices heretofore engaged in. And that such con-

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Plaintiffs' Exhibit No. 12—(Continued)

duct in the future as represented by the buying power, which is created by this decree, should be scrutinized. And B, that in the consideration of this and other matters pending before this Court to their final conclusion the Court should bear in mind, and we feel that we are fully justified in this statement, that this is not at all solely and [1091] exclusively an exhibitor case. It is a case seeking to destroy a monopoly in this industry as a whole, and in so far as independent producers are concerned, we are prejudiced by the concentration of power against the purchase of our pictures in like manner as the independent exhibitor may be prejudiced by reason of the concentration of power with respect to distributors' sale of pictures.

We believe that by their acts ye shall know them, not by the paper or the words written upon it, and that the effectiveness of this decree is not by anything stated in just general terms. This decree I think properly is written in terms smacking of constitutional provisions, because we know that by specific limitation you thereby give license to that which is not included.

We feel that these expressions must be made and made part of the record so that we may again have the opportunity should we feel that the compliance does not conform with what we all hope the desire of the Government is and the desire of this Court is, and we feel the desire of all well wishers of this industry, to instill competition, to come again and call these matters to your Honors' attention.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Proskauer: May I say just a word about that argument, your Honor? I have no [1092] interest in this consent decree controversially, but for this organization to come in after this case is tried and indulge in that kind of talk in the face of the concession of the Government in this record that no producer could ever produce a decent picture who had any trouble in Washington, and in the face of the conceded proof of the continued prosperity of all these independent producers is a suggestion not directed against this consent decree. It is directed to make your Honors forget all that side of this record and the concessions of the Government when it comes to the trial of our case.

Mr. Wright: If your Honors please, I have no desire to make any part of the argument of the case at this time, but since very confusing and inaccurate figures have been thrown at you regarding the decree, I think they ought to be corrected.

The Paramount Circuit as it now exists has about 1,450 theatres in it. The new theatre company may own that exercised all of the conversion rights to convert partly or wholly owned theatres, in the course of dissolving joint ownership, may come out with 650. The size of that company would vary from 400 to 650 theatres.

I would agree that it would be a proper decree if the circuit that emerged were even smaller. However, [1093] as we read the Supreme Court decision dealing with the problem, and we litigated every in-

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Plaintiffs' Exhibit No. 12—(Continued)

dependent circuit case through the Supreme Court in order to get that law established, it deals with the problem in terms of opening up closed towns, rather than in terms of size.

The aim here has been to see that this circuit does have opposition at all critical points so that there are alternative outlets in all locations where it operates, and that in our view is a far more effective means of dealing with the problem of circuit buying than to say in some decree, provide a form of dealing and negotiating licenses.

The whole theory of this decree is that competition can best be introduced into this industry by creating a proper incentive so that it results from the pursuit of normal business incentive. That is true both of the divorcement here and the manner in which the circuit has been dealt with. [1094]

Judge Hand: Mr. Wright, I think speaking for myself at the moment, and I think from what my associates have said, that we are not in favor of allowing intervention here. The thing that has somewhat bothered some of us the prohibition which seems a little unnecessary, namely, we have no control over it in this kind of consent decree. There was objection to that by Mr. Raftery and Mr. Frohlich.

Mr. Wright: Well, I should say on that point——

Judge Hand: You haven't got a couple of wrongdoers there, but they were more or less in the soup if they didn't do it, and they were not

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Plaintiffs' Exhibit No. 12—(Continued)

aggravating the case at all. They haven't got any theatres. Why in the world should there be any provision in the decree which affects their right to buy some of those theatres?

Mr. Wright: Well, if the Court please, in our view it accomplishes this: suppose that we were merely to transfer to another distributor the theatres that now compose the Paramount Circuit: I should suppose that would be the best possible way to invite precisely the same type of discrimination that is occasion for this divorcement. As we see it there is no particular sense in divorcing the circuit from existing picture company in order to give the distributing company normal incentive to sell on a [1095] competitive basis and the circuit to buy on a competitive basis unless you are going to do what you can to safeguard those incentives.

Now transferring of these theatres to another defendant distributor who as a party to the very conspiracy here which has resulted in this lawsuit in our view would be utterly contrary to the purpose we are trying to achieve here of opening up a free market in which any picture company must survive on the basis of the merits of its product and any theatre has to survive on the basis of its merits in serving the public needs for entertainment in the community where it is.

Judge Hand: What about these clauses 7 and 8? 8 you say you took from my decree, but there seems to be some confusion about it.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Wright: Well, the confusion is wholly the result of misstatements that have been made here this afternoon. The fact is that section 7 in this decree is precisely the same as section 7 in the RKO decree and in the 1946 judgment.

Judge Hand: That is all right. There is no doubt that is all right by itself.

Mr. Wright: Yes.

Judge Hand: Now what about 8? [1096]

Mr. Wright: Well, 8 was added to it as I have pointed out in order to comply with the Supreme Court's direction to add an anti-discrimination provision to the affirmed provisions of the judgment dealing with how films should be licensed. That is why that is in there.

Judge Hand: That might be improved. (Examining document.)

Theatre by theatre: what does that mean?

Mr. Wright: Well, I take it that that means that where——

Judge Hand: It doesn't mean that it got to be separately offered?

Mr. Wright: I beg your pardon?

Judge Hand: It doesn't mean that it can't be offered, they can't make an arrangement to take a lot of pictures?

Mr. Wright: Well, what it means I take it is if one exhibitor has 50 theatres and the other exhibitor who wants to run has one, the distributor in awarding the exclusive run to one as against the other considers the offer of the exhibition in the

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Plaintiffs' Exhibit No. 12—(Continued)

one theatre as against what the other exhibitor is offering for exhibition in the theatre immediately in opposition, not on the basis of what he gets from the circuit.

Judge Hand: I guess you have to have [1097] that in order to comply with the non-discrimination phase.

Mr. Wright: I can't see how you can prevent discrimination in any other terms except theatre by theatre.

Judge Hand: The thought is pretty complex when you are considering the right of offering eight pictures. You have got to then find out whether anybody else wants one of them.

Mr. Wright: Well, I don't think it works quite that way. You have continuous cross-dealing. Of course you have people come in and you know what pictures they want, what runs they want in the ordinary conduct of your business.

Judge Goddard: You spoke of 51 theatres. You said 50 and 1. That is the 51 theatres would be put on par? That is all it means, isn't it?

Mr. Wright: 50?

Judge Goddard: 51 theatres. You used the illustration of one owner owning 50 theatres and another owning one theatre.

Mr. Wright: Yes.

Judge Goddard: That means 51 theatres on a par in bidding. [1098]

Mr. Wright: Yes, yes, that there should be. Eliminates any discrimination based on a considera-

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Plaintiffs' Exhibit No. 12—(Continued)

tion of "Here's a man who is offering us a 50-theater deal," and "Here is one who is only offering us a one-theatre deal."

Judge Coxe: It is my understanding, from what you stated before, that this section 8 is not a qualification of Section 7. They both of them stand together.

Mr. Wright: Yes.

Judge Hand: That is undoubtedly so.

Mr. Wright: That clearly is the intention.

Judge Hand: There is a real difficulty in dealing with its application.

Judge Coxe: As long as that is understood, I think that is entirely proper.

Judge Hand: With respect to these motions to intervene, they are denied, after giving the applicants as much opportunity to argue as though they had really been intervenors.

Is there anything else?

Mr. Wright: There is a motion to extend the time of argument from March 30 to April 19, and our time for filing briefs to April 1.

Judge Hand: I thought we had extended [1099] it already.

Mr. Wright: The motion is formally made today. I had spoken to you.

Mr. Proskauer: There is not going to be any objection, if Mr. Wright will state exactly what he wants so we will get it clearly.

Judge Goddard: Was extended to April 19th.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Wright: The time for the argument is extended, as I understand it, from March 30 to April 19, and the time for filing our brief is extended from March 1 to April 1.

Mr. Proskauer: So we will have two weeks more.

Mr. Wright: Almost three.

Mr. Proskauer: And, your Honors, I don't want to ask for any ruling; I just lodge a caveat, which I hope I won't have to exercise. I may have to ask your Honors, though, in view of all these changed conditions, to put in some slight testimony in view of what may occur in Mr. Wright's brief. I think I am speaking for all the defendants when I say that, but I don't think it is going to be necessary and I hope it won't.

Mr. Wright: I can assure you there will be nothing in my brief which will be the occasion for further testimony.

Mr. Proskauer: I am pretty sure of that too because I don't think there will be enough in your brief to warrant any further testimony.

Reporter's Certificate attached.

Admitted November 15, 1950.

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PLAINTIFFS' EXHIBIT No. 17

In the
Supreme Court of the United States

No. .....

PARTMAR CORPORATION,
Petitioner,
UNITED STATES OF AMERICA,
Plaintiff,
vs.
PARAMOUNT PICTURES, INC., et al.,
Defendants.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

The order of the District Court denying the application for intervention was entered on March 3, 1949. No opinion of the Court was stated or written. Some reasons for which the intervention was denied are indicated here and there in the transcript of the proceedings.

Jurisdiction

Jurisdiction of this Court is based on section 2 of the Expediting Act (United States Code, Title 15, section 29; and 28 U.S.C. 2101).

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Plaintiffs' Exhibit No. 17—(Continued)

Statutes

Rule 24, Federal Rules of Civil Procedure:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In

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Plaintiffs' Exhibit No. 17—(Continued)

exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Statement

In this case the mandate of this Court required the District Court (1) to vacate its judgment of December 31, 1946, as to so-called franchises, i.e., long-term contracts for motion pictures, and to re-examine that subject in the light of the elimination from that judgment of competitive bidding; and (2) to ascertain what, if any, theatres the defendants had acquired or maintained by monopoly methods or used in restraint of trade, and to divest them of such theatres.

Partmar Corporation, the appellant, had a franchise from Paramount Pictures, Inc., which the film company refused to perform after the judgment of December 31, 1946, and ostensibly pursuant to that judgment. Partmar also leased a theatre in Los Angeles from Paramount, in which it used the pictures. On the theory that the injunction against the franchise gave Paramount the right to end the tenancy before the expiration of the term, Paramount is also attempting to evict appellant, so that Paramount may take over the theatre for its own use. Compliance with the mandate as to that one theatre only would have rendered the attempt to evict appellant and the purpose to continue the monopoly use of the theatre futile.

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Plaintiffs' Exhibit No. 17—(Continued

But the mandate was not applied. Instead, Paramount and the plaintiff agreed to a final consent judgment which discarded the principle of divestiture of the mandate, especially in requirements which would have relieved the appellant as an independent exhibitor. Appellant, therefore, sought to intervene and have the District Court receive evidence from it showing that the theatre in Los Angeles had been acquired and maintained by Paramount by monopoly methods, had been used in restraint of trade, and that the termination of the film franchise and the eviction constituted a continuation of those methods. It asked that the judgment should affirmatively prevent retention of that particular theatre and prevent the enforcement of default conditions incidental to an enjoined franchise to divest an independent exhibitor of a leasehold estate in a theatre.

Admitted November 15, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 389, inclusive, contain the original Complaint; Notice of Motion to Dismiss for Failure to State a Claim Upon Which Relief

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Can Be Granted; Notice of Motion to Strike; Order Denying Motion to Dismiss and Motion to Strike; Answer and Counterclaim of Partmar Corporation, et al.; Motion to Bring in Other Parties and Order Thereon; Amendment to Answer and Counterclaim; Notice of Motion and Motion of Plaintiff to Dismiss; to Strike and for a More Definite Statement or for a Bill of Particulars and Memorandum of Points and Authorities in Support; Amendment to Plaintiff's Motion to Dismiss; Motion to Strike and Memorandum of Points and Authorities in Support Thereof; Stipulation for Appearance of Third Party Defendants; Order on Motions of Plaintiff and Third Party Defendants to Dismiss, to Strike, etc.; Reply to Alleged Counterclaims; Notice of Motion and Motion for Separate Trial on Counterclaims and Memorandum of Points and Authorities in Support Thereof; Order on Motion for Separate Trials, etc.; Notice of Motion for Continuance of Pre-trial and Trial; Notice of Motion for Summary Judgment and Points and Authorities; Statement of Facts on Motion for Summary Judgment; Notice of Cross-Motion for Summary Judgment or in the Alternative to Set for Trial; Order on Motions of Plaintiff and Defendants for Summary Judgment, etc.; Stipulation and Order re Amendment to Counterclaim; Trial Memorandum of Points and Authorities; Brief for Defendants; Notice to Take Depositions; Notice of Motion and Motion for Order Delaying Taking of Deposition; Memorandum of Opinion; Findings of Fact and Conclusions of Law; Judgment; No-

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tice of Appeal; Designation of Contents of Record on Appeal; Designation of Record; Supplemental Designation of Record; Stipulation and Order Extending Time to Docket Appeal; Demand for Statement of Points by Appellant; and Third Party Defendants' Statement of Additional Items to Be Included in the Complete Record, and a full, true and correct copy of minute order entered May 7, 1951, which, together with the original exhibits and copy of reporter's transcript of proceedings on June 11, Sept. 8, 15 and 16, 1947; January 26, Apr. 26, and June 7, 1948; March 15, June 2, 1949; January 23, 30, Apr. 17, 24, November 8, 9, 10, 14, 15, 16, 17, December 5, 6, 7, 8, 12, 13, 14, 15, 19, 20, and 21, 1950; June 4 and 18, 1951, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fee for preparing and certifying the foregoing record amounts to $3.20, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 17th day of September, A.D. 1951.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

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[Endorsed]: No. 13113. United States Court of Appeals for the Ninth Circuit. Partmar Corporation and Fanchon & Marco, Inc., Appellants, vs. Paramount Pictures Theatres Corporation and Paramount Pictures, Inc., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 24, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13113

PARTMAR CORPORATION, et al.,
Appellants,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION, et al.,
Appellees.

APPELLANTS' STATEMENT OF POINTS RELIED UPON ON APPEAL

To Paul P. O'Brien, Clerk of the United States Court of Appeals for the Ninth Circuit:

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The appellants intend to rely on the following points on appeal:

1. No issue of conspiracy in restraint of interstate trade arose as an issue upon the complaint, and conspiracy was not specified on the motion for summary judgment or at the trial as making the franchise unlawful.

2. Substantial evidence of conspiracy was excluded at the trial, and the exclusion would have been prejudicial error had the trial applied to the counterclaims.

3. The finding in the eviction suit that the franchise was lawful on the evidence in that case is perfectly consistent with the existence of the conspiracy in restraint of interstate trade in motion pictures alleged in the counterclaims.

4. Dismissal of the treble damage claims without trial deprives the appellants of due process of law and other constitutional rights.

Dated October 2, 1951.

MacFARLANE, SCHAEFER & HAUN,
HENRY SCHAEFER, JR.,
WILLIAM P. GAMBLE,
JAMES H. ARTHUR,
By /s/ WILLIAM GAMBLE,
Attorneys for Appellants.

RUSSELL HARDY,
Of Counsel.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 4, 1951.

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No. 13113

United States
Court of Appeals
For the Ninth Circuit

PARTMAR CORPORATION and FANCHON & MARCO, INC.,

Appellants,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION and PARAMOUNT PICTURES, INC.,

Appellees.

Appeal from the United States District Court for the Southern District of California, Central Division.

Proceedings Had in the United States Court of Appeals for the Ninth Circuit

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Wednesday, October 1, 1952.

Before: Stephens, Bone and Pope,
Circuit Judges

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Russell Hardy, counsel for the appellants, and by Mr. Rodney K. Potter, counsel for appellees, and submitted to the court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Tuesday, December 16, 1952.

Before: Stephens, Bone and Pope,
Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten per curiam opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

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United States Court of Appeals
for the Ninth Circuit

No. 13,113

PARTMAR CORPORATION and FANCHON & MARCO, INC.,

Appellants,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION and PARAMOUNT PICTURES, INC.,

Appellees.

Appeal from the United States District Court for the Southern District of California, Central Division

Before: Stephens, Bone and Pope,
Circuit Judges

PER CURIAM

The Honorable Harry C. Westover, United States District Judge, has thoroughly discussed the issues of the above-entitled case in an opinion printed in 97 Fed. Supp. 552, and we affirm the judgment for the reasons given therein.

Affirmed.

[Endorsed]: Per Curiam Opinion. Filed Dec. 16, 1952. Paul P. O'Brien, Clerk.

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United States Court of Appeals
for the Ninth Circuit

No. 13,113

PARTMAR CORPORATION and FANCHON & MARCO,

Appellants,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION and PARAMOUNT PICTURES, INC.,

Appellees.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered and adjudged by this Court that the appellees recover against the appellant for their costs herein expended and have execution therefor.

Filed and entered December 16, 1952.

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United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 433 pages, numbered from and including 1 to and including 433, to be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 24th day of February, 1953.

[Seal] PAUL P. O'BRIEN,
Clerk.

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SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 641

PARTMAR CORPORATION and FANCHON AND MARCO, INC., Petitioners

vs.

PARAMOUNT PICTURES THEATRES CORPORATION, et al.

ORDER ALLOWING CERTIORARI—Filed May 25, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, limited to the issue of dismissal of the counterclaims.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Office - Supreme Court, U.S.
FILED
MAR 4 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~641~~ 17

PARTMAR CORPORATION and FANCHON & MARCO, INC.,
Petitioners,

v.

PARAMOUNT PICTURES THEATRES CORPORATION, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUSSELL HARDY,
JAMES WALLACE KEMP,
HENRY SCHAEFER, JR.,
Attorneys for Petitioners.

February, 1953.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No.

PARTMAR CORPORATION and FANCHON & MARCO, INC.,
Petitioners,

v.

PARAMOUNT PICTURES THEATRES CORPORATION, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, CHARLES REAGAN, BARNEY BALABAN and Y. FRANK FREEMAN.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Partmar Corporation and Fanchon & Marco, Inc., pray that a writ of certiorari issue to review the judgment entered in this case on December 16, 1952, by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the district court is printed at Record p. 70, and is reported at 97 F. Supp. 552. A per curiam opinion of the Court of Appeals is printed in full, *infra*, pp. 27-28.

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JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1952. The jurisdiction of this Court is based on section 1254 of the Judicial Code. (28 U. S. C. A. sec. 1254)

QUESTIONS PRESENTED

1. Whether a court may dismiss with prejudice, without any trial, claims for treble damages for violation of the antitrust laws, which have been sustained by the court as valid, and which are not otherwise barred.

2. Whether such dismissal lacks due process of law.

3. Where claims for treble damages for violation of the antitrust laws have been filed as counterclaims, and a separate trial of the main action apart from and preceding a trial of the counterclaims has been ordered by the court, and the issue of fact and law in the counterclaims and the main action are different, and a separate trial of the main action has been had—may the court dismiss the counterclaims with prejudice at the end of the trial of the main action and without any trial of the counterclaims.

4. Whether such dismissal lasks due process of law.

5. Whether, in an action under the antitrust laws to recover treble damages, it is clearly erroneous for the court to refuse to receive two final non-consent judgments entered in a suit by the United States against the parties who are also defendants in the treble damage suit, and based on the same conspiracy in restraint of trade on which the treble damage suit is based, as *prima facie* evidence of all matters respecting which the judgment would be an estoppel between the parties thereto, including the fact the defendants have engaged in the conspiracy.

6. Whether, in an action by a landlord to evict a tenant, brought under the California statute, in which the issue made by the landlord is whether he has violated the federal antitrust laws, and in which the landlord introduces in

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evidence two judgments entered in a case brought against him and others by the United States, which adjudge the landlord guilty of violations of the antitrust laws—the judgments are or are not conclusive evidence against him of matters respecting which they would be an estoppel between the parties thereto.

7. Whether a court may receive such judgments in evidence, subject to the limitation made by the offering party, that they shall be received as evidence merely of the entry of only one among many injunctive provisions against him contained in the judgments, and thereafter in the same case enter a valid judgment in favor of the offering party and against his adversary, to the effect that the offering party has not been guilty of the violations of the antitrust laws adjudicated in those judgments.

8. Whether an adjudication in one case, that one contract granting a license for the use of motion pictures in one theatre, which contains admission price fixing provisions and other restrictive conditions in favor of the licensor, is not, standing alone, violative of the antitrust laws, amounts to an adjudication that the price fixing and other restrictive provisions are not parts of a general conspiracy for fixing admission prices and imposing other restrictions on a nation wide scale, and constitutes a bar to an action for treble damages based on such conspiracy.

9. Whether such an adjudication, bars treble damage claims under the antitrust laws by the licensee, for recovery of conspiracy and monopoly overcharges on the pictures which have been licensed under the contract for use in his theatre.

10. May a court entertain an action in which the plaintiff alleges that he has been guilty of violating the antitrust laws, and has been prohibited by the judgment of another court from continuing the violations, and in which the plaintiff seeks a judgment in his favor based on the fact of his violation.

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11. Whether a system for the allocation of motion pictures among exhibitors for use in their theatres, by which practically every theatre in every community throughout the United States, including Los Angeles, is classified in a fixed position as to the run and clearance for which it may receive licenses for pictures—which system has been built up, accepted, adopted and practiced by the major distributors, who distribute eighty or more percent of the pictures, and according to which the theatres of the distributors receive practically exclusively the first and preferential use of the pictures—and which is effectuated by uniform and unanimous refusals of the distributors to license pictures to anyone or any other terms—constitutes a conspiracy in restraint of trade in violation of the antitrust laws.

STATEMENT

Briefly stated, in this case a landlord sued to evict a tenant from a theatre in which he was engaged in the motion picture exhibition business, based on the allegation in the landlord's complaint that he had terminated the tenant's lease because of violation of the antitrust laws by the landlord. Although in *United States* v. *Paramount,* 334 U. S. 131, the landlord had been found guilty of practicing a conspiracy in restraint of trade by a wide variety of methods and on a nationwide scale, the allegation in the eviction suit was limited to a fragmentary part of that conspiracy, and thus tendered for decision a sham issue. After a long trial, to which the tenant objected, the court entered a judgment on the sham and limited issue to the effect that the landlord's action, so limited, had been perfectly lawful. The court then refused to try, and dismissed with prejudice, counterclaims of the tenant against the landlord for treble damages which were based on the conspiracy in the *Paramount* case in its entirety, and injury to petitioners in their property and business, on the ground that the judgment in the eviction case was decisive of and barred the counterclaims. The effect was to enable the

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landlord, with the assistance of the court, to whipsaw the tenant on the counterclaims.

At the time laid in this case, the respondents were affiliated corporations and officials thereof, and were engaged in the production, distribution and exhibition of motion pictures. Paramount Pictures Inc. owned all of the stock of the two other corporation respondents. (R. 6, 8) The corporation and individual respondents will be referred to collectively as Paramount.

Paramount was the largest combination of motion picture theatres in the world and in the United States. It operated 1,395 theatres in the United States. (*United States* v. *Paramount*, 334 U. S. 131, 167)

Petitioner Partmar Corporation operated one motion picture theatre, which was located in Los Angeles. It was the only wholly independent first run exhibitor in the area; that is, it was independent of any corporate affiliation with any of the large picture and theatre combinations in the business, but in other respects its independence was severly limited by the monopoly held and practiced by those combinations. (R. 4, 9, 12)

Partmar occupied the theatre as a lessee of Paramount, for a term to expire on March 17, 1952. (R. 4) Petitioner Fanchon & Marco, Inc., owned all the stock of Partmar, and was a party to the lease, as a guarantor of performance by Partmar. (R. 23) The lease provided for extremely large theatre rental payments to Paramount, in terms of percentages of the gross receipts of the business. (R. 147) Partmar was also heavily dependent upon Paramount for pictures to run the theatre, because of unlawful monopoly conditions appertaining to the supply of pictures created by respondents and others, as is more fully described in the opinion of this Court in *United States* v. *Paramount*, 334 U. S. 131, and Paramount took advantage of that condition to impose very large film rental charges on Partmar.

On May 1, 1947, Paramount brought suit in the United States District Court at Los Angeles to evict Partmar from

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the theatre, under the California landlord and tenant summary eviction statute. (R. 3) In that suit petitioners filed counterclaims for treble damages under the antitrust laws, based on the fact that Paramount had been engaged in the unlawful restraint and monopoly described in the *Paramount* case, and had compelled petitioners to pay excessive theatre rentals and license fees for pictures needed for the theatre. (R. 27) By order of the district court, the eviction suit and the counterclaims were separated for trial. (R. 44) After a trial of the eviction suit alone, eviction of Partmar was denied. (R. 109) Without any trial of the counterclaims, which had previously been held by the court to be well pleaded and valid, they also were dismissed with prejudice, in the judgment denying eviction. (R. 109) On appeal from the dismissal of the counterclaims, the denial of trial was affirmed *per curiam* by the Court of Appeals for the Ninth Circuit.

The eviction suit was based on a judgment of the United States District Court for the Southern District of New York dated December 31, 1946, in *United States* v. *Paramount*, 66 F. Supp. 323, 1946; 334 U. S. 131, 1948. (R. 12-15) In that case respondents and others were adjudged guilty of conspiracy to restrain and monopolize the distribution and exhibition of motion pictures on a nationwide scale. Among other things, the judgment prohibited the continued performance of so-called franchise contracts between defendants in the *Paramount* case and exhibitors, i.e., contracts which provided for furnishing pictures to any exhibitor for a period of more than a year. (R. 302) This particular prohibition was later vacated on appeal by this Court, and was the only prohibition in the judgment of the district court not affirmed. (334 U. S. 156) Petitioners were not parties to the *Paramount* case.

Such a franchise was in effect between Paramount and Partmar, running for a term coincident with the lease. The lease contained a provision that the landlord should have an option to terminate the lease if at any time during the

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term the franchise should be terminated. (R. 10) The eviction suit involved that provision.

The franchise was merely a general contract by which Paramount agreed to make contracts from time to time in the future for a period of ten years, for specific pictures to be produced. (R. 247, 295) It required that Paramount pictures should be used in the theatre for forty-six weeks of each year. (R. 251) The purpose of the eviction clause, in the theatre lease was to tie the Paramount pictures and the theatre together, and especially to continue holding them together if at any time in the future it came to pass that the supply of pictures from all companies should become available to the tenant. In that event, Paramount could oust, or attempt to oust, the exhibitor, take over the business itself, and easily continue the same degree of exclusive use of Paramount pictures. The purpose of the judgment in the *Paramount* case was to make the entire supply of pictures freely available in a competitive market to all exhibitors. The purpose of the eviction suit was to defeat that judgment as to Partmar.

The eviction complaint alleged that the judgment in the *Paramount* case prohibited performance of the franchise, that it was a "final" judgment, that it terminated the franchise, that the landlord had then terminated the lease, and that petitioners had refused to vacate the theatre on demand. (R. 16, 17) There was no allegation that the tenant was not making rental payments nor otherwise performing the terms of the case. Petitioners moved to dismiss the suit on the ground that the franchise had been enjoined because of violations of law by respondents, that the court ought not to grant relief to wrongdoers in a case based on their own wrong, that petitioners were not participants in but victims of the wrongdoing, that the lease did not grant any right to terminate the lease if the franchise should be terminated because of the unlawful conduct of Paramount, that the judgment did not apply to the franchise, and that it was not final but was pending on appeal to this court. The motion was denied.

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Petitioners then filed an answer in which they set up as a defense that Paramount was a party to the conspiracy in the *Paramount* case, and was seeking to evict petitioners in pursuance of that conspiracy, that the effect of the eviction would be to drive petitioners out of business and enable Paramount to take over the theatre, and thus increase and extend the unlawful control condemned and required to be discontinued by the very judgment on which the eviction suit was based. (R. 27) That defense also was rejected by the district court as an improper collateral attack on the right to terminate the lease.

Petitioners included in the answer counterclaims for treble damages and injunctive relief. (R. 36) The damages claimed were for monopoly overcharges exacted by Paramount for pictures furnished for the theatre and for theatre rentals; that is, for the difference between the license fees and theatre rentals which would have been paid in an unrestrained and unmonopolized market and the fees and rentals which had been paid under the monopoly conditions found in the government case to have been established by Paramount and others.

The counterclaims named as defendants seven parties who were not parties to the eviction suit—Paramount Pictures Inc. and six of its principal officials. (R. 36) While the complaint alleged that these defendants were engaged in the conspiracy in the *Paramount* Case, it did not name as defendants in this case the other co-conspirators in the *Paramount Case.*

On motion to dismiss the counterclaims, they were sustained as valid actions under the antitrust laws. Both actions—the eviction suit and the treble damage claims—were then at issue on the facts.

Shortly after the decision sustaining the counterclaims as valid, the eviction suit and the counterclaims were formally separated for trial, by order of the district court, on motion of Paramount. The order provided for entirely separate trials of the two suits, and for trial of the eviction case first. (R. 44-45) The separation was based on the

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fact that the cases were different as to the evidence and the facts and law. As petitioners agreed that this was correct, they made no objection to separate trials.

At this stage of the case, the whole factual basis of the eviction suit was suddenly swept away, by the decision of this Court on May 3, 1948, in *United States* v. *Paramount*, 334 U. S. 131. In that case this Court reversed the prohibition of franchises. As that decision negatived the fact on which the eviction suit was based—termination of the franchise—petitioner moved for dismissal; this time on the ground that the case had become moot by the demonstrated nonexistence of the basic fact. The motion was denied.

As the reversal of the judgment by this Court made it impossible for Paramount to oust petitioners on the ground that the franchise had been enjoined, Paramount deserted that ground and based the claim for repossession of the theatre on the radically different ground (1) that the franchise was in unlawful restraint of trade, standing alone, and apart from the conspiracy found as a fact in the government case, and (2) that the franchise had been terminated by Paramount for that reason and independently of the judgment in the government case. Specificaly, it was asserted that the franchise was unlawful, standing alone, because it provided that Paramount should fix the admission prices to be charged at the theatre, that it required the theatre to use Paramount pictures exclusively, and provided for the imposition of clearances to be determined by Paramount. (R. 46-47)

In refusing to dismiss the eviction suit, the district judge fully agreed with this new thesis as to the issue in the case. In doing so, he treated the decisions of this Court and the District Court in the *Paramount* case, as having no effect, as to the facts or law, on the eviction suit before him, except possibly as decisions of other courts in similar cases. The statement of this Court with reference to the very franchise in this case, that "we cannot say on this record

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that franchises are illegal *per se* when extended to any theatre or circuit no matter how small" (334 U. S. 156), was treated as if it were a statement and decision on entirely different transactions of entirely different parties.

The following are specific statements of the district judge to this effect:

> I am at a loss still to understand what the New York action has to do with this case unless it is merely to set a precedent which we can follow here . . . (R. 47)
>
> . . . . . .
>
> But here, the question is, was this franchise agreement legal or illegal under the Sherman Act. That is a question to be determined here, not in New York or somewhere else . . . (R. 47)

Finally the trial of the eviction suit began on November 8, 1950. For eighteen daily sessions of the court, it continued, and at length ended in a decision denying eviction. (R. 113-142)

The change of the issue in the case from termination of the franchise by the judgment in the government case, to termination by Paramount because unlawful, which was permitted after the decision of this Court vacating the judgment as to franchises, was not accomplished by any change in the pleadings or by other formal procedure. As no amendment of the complaint or other procedural action was taken, it was not possible for petitioners to oppose or admit or deny the new case by any responsive pleading.

The case was therefore tried without any standard or guide except that the decision should turn upon the lawfulness or unlawfulness of the conduct of the landlord. According to that rule if the landlord should convince the court by evidence and otherwise that the franchise was unlawful because of the restraints imposed on the tenant by the landlord for the benefit of the landlord, the court should award the landlord possession of the theatre, and turn the innocent tenant out.

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The issue thus tendered for the decision of the court, was an unrealistic and sham issue, for it selected as the subject for trial and decision a small detached portion of a nationwide course of action. For the court to conduct a trial for the purpose of deciding the legality of admission price fixing, clearance and exclusive dealing provisions of one contract for one theatre, isolatedly considered, when in truth these provisions were parts of a nationwide conspiracy for fixing prices and maintaining an exclusionary system, which, moreover, had been specifically adjudicated to be unlawful by this Court, was to spend time on an academic and non-existent case, at the instance and for the benefit of a self-accusing wrongdoer.

Petitioners had no recourse, however, but to submit to the decisions of the district court, and to make their defense at the trial conformably to the case as thus devised by the landlord and sanctioned by the court. Petitioners, therefore, based their case upon the premises (1) that the self-accusation of unlawful conduct by the landlord was unnatural and not permissible as a basis for judgment in his favor, (2) that it was elementary that the franchise, standing alone and apart from the conspiracy, was lawful, and (3) that the cause of the restraints and monopoly conditions existing in the motion picture business in the Los Angeles area was not the franchise, but the conspiracy in the *Paramount* case.

The distinction between the issue in the eviction suit and the issue in the counterclaims—illegality of the franchise standing alone, and the conspiracy in the government case—was consistently maintained against petitioners throughout the trial, and the order separating the two cases remained effective without change. No order or stipulation or procedure to the contrary occurred. At the opening of the eviction suit, counsel for the landlord said that both sides had prepared their cases pursuant to the separation order—

> so that the evidence will proceed, so far as the plaintiff is concerned, and I believe it has been indicated by

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> counsel for the Fanchon & Marco and Partmar group that they are prepared to proceed accordingly in pursuance of Judge Mathes' order for these seperate trials. My opening statement, therefore related solely to this first separate trial on the unlawful detainer and I reserve the opening statement on the counterclaims to a later time—perhaps next month when we get to that, or earlier if we do so, and I understand that counsel for the defendants are preparing their presentation and their statements accordingly. (R. 118.)

See also Record, pages 114, 115, 116, 117.

Accordingly, the opening statements of both parties were confined to the facts relative to the character of the franchise standing alone and apart from conspiracy. No witnesses were called and no evidence was presented by petitioners to establish, or by respondents to rebut, the counterclaims and the conspiracy upon which they were based, and no arguments or briefs for or against the counterclaims, were at any time made or submitted to the court by any of the parties.

Judgments in the *Paramount* case were introduced in evidence by the landlord. (R. 299, 312) The judgment of the district court in that case, of December 31, 1946, which contained the injunction against franchises on which the eviction suit was based, and which had been vacated as to franchise by this Court in its decision of May 3, 1948, was offered and accepted.

That judgment also contained injunctions against the conspiratorial and monopoly admission price fixing, the unlawful system of runs and clearances, and similar practices. It was based on findings, sustained by this Court, that the respondents and others had engaged in the conspiracy in restraint of trade on which the counterclaims in this case are based. (70 F. Supp. 54) But the judgment was offered by the landlord "for the limited purpose only of showing Paramount as being subject to the injunctive features" of the judgment, "for the limited purpose of the court considering those portions of that decree pertinent to

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this case of the unlawful detainer." (R. 128-130) To make certain whether this limitaion affected the judgment as evidence of the conspiracy, petitioners objected to the limitation because it emasculated the judgment of its intrinsic, conclusive and legal, evidentiary quality in that regard. But the objection was overruled, and the court expressly refused to give the judgment any evidentiary effect at all as to the existence of the conspiracy. In overruling the objection, the trial judge said, "when it comes your turn, if you want to introduce it or make a motion that it be received *in toto,* you can." (R. 130-131) Petitioners' turn never came, however, because of the surprise dismissal of the counterclaims.

A second judgment in the government case, entered March 4, 1949, was also offered and received, subject to the same limitation, and over the same objection. (R. 131-132) Both judgments, by section 5 of the Clayton Act, were admissible as *prima facie* evidence in support of the treble damage claims at the trial of those claims. Correctly considered, the judgments, when offered by the landlord, became conclusive admissions by the landlord against himself of all facts concluded by the judgments against the parties to the judgments, of which the landlord's sole stockholder was one. This made the judgments conclusive evidence of the conspiracy. The only possible justification for the refusal to give the judgments this effect in the eviction suit, was that conspiracy was not an issue in that case and that the counterclaims were not then on trial.

Evidence offered by petitioners to show that the attempt to evict petitioners was in pursuance of the conspiracy in restraint of trade, was excluded on the ground that conspiracy was not an issue in the eviction suit. In thus excluding evidence, the trial court said:

> The question before this court, as far as the franchise agreement is concerned, is whether or not that agreement tends to monopolize the motion picture business here in Los Angeles. (R. 134)

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From time to time throughout the trial, the trial judge made statements to the effect that as of the time the several statements were made, no evidence of conspiracy had appeared in the case, thus making plain that the order separating the two cases for trial and postponing and excluding the issue of conspiracy until the later trial of the counterclaims, was being continuously observed by the court and the parties. On the twelfth day of the trial the trial judge said:

> So far as this case (sic), there hasn't been one iota of evidence to indicate there was any conspiracy with Paramount, Fox, Warner Brothers, or any other producer or distributor.
>
> The only thing you have got in this case so far is the decision in the Supreme Court case in which it says, "In the country as a whole there is a conspiracy." They didn't say in Los Angeles there is a conspiracy.[1] It might be inferred, because Fox, Warner Brothers, Paramount, and the other producers operated in Los Angeles, there is a conspiracy, but so far there hasn't been anything to show that any agreement that was made by Paramount was made in conjunction with a similar agreement made by Warner Brothers or even with Warner Brothers' or Fox's knowledge that the agreement was being made. (R. 137-138)

On the seventeenth and next to last day of the trial, the trial judge said:

> So far, in this case, there hasn't been any evidence of any kind that there has been a conspiratorial relationship between Paramount and any other of the distributors or the exhibitors. (R. 142)

In the evidence, the landlord was not held strictly to the issue originally approved by the court, namely, that the franchise standing alone was violative of the antitrust laws, or, as stated by the landlord's counsel, the "inherent validity or invalidity" of the franchise. (R. 46) In the trial,

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[1] The logic here seems to be that the "whole" of the country does not include that "part" which is Los Angeles.

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the landlord was permitted to depart from this thesis of "inherent validity or invalidity" and introduce evidence in an attempt to show that the franchise had caused restraints and monopoly conditions in the Los Angeles area.

In their counterclaims petitioners charged, in effect, that the restraint and monopoly conditions found as facts in the government case, also existed in the Los Angeles area, including the same conspiratorial admission price fixing, the same conspiratorial system of runs and clearances, and the same vertical combinations by which practically all the first run theatre business was restrained and monopolized for the benefit of Paramount and the other major picture and theatre companies.

But the evidence introduced by the landlord was carefully and voluntarily trimed to show the existence in the Los Angeles area of only some of the conditions revealed in the government case, and was carefully limited to the theory that they had been caused solely by this particular franchise. Petitioners, however, pointed out the perfectly obvious fact

> that none of the restraints and monopoly conditions that have existed here can be traced to this contract, to the terms of this contract. That all of the restraints and monopoly conditions that exist here exist because of the conspiratorial arrangements between Paramount and Fox West Coast principally. (R. 135)

At the close of the trial of the eviction suit, on December 21, 1950, the trial of the counterclaims was postponed by the court pending a decision of the eviction suit. In its opinion the district court stated:

> At the time of trial it was agreed that action on the counterclaims should be postponed until after the trial of the main issue involved, and no evidence was offered by either plaintiff or defendant on the counterclaims. (R. 94)

On May 2, 1951, the court decided the eviction case against the landlord, denying the eviction on the ground

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that the judgment in the *Paramount* or *government* case had not terminated the franchise (R. 93).

The court went further, however, and found that the franchise had not been made as a result of any combination or conspiracy between Paramount and others; and concluded that for that reason petitioners could not recover upon the counterclaims. The counterclaims were dismissed with prejudice. (R. 110) In its written opinion, the Court said:

> It appears that all of the counterclaims, with the exception of the third counterclaim, are based upon conspiracy. As we find no substantial evidence of a conspiracy in this case on the part of Partmar or Paramount, we are of the opinion that the counterclaimant cannot recover upon the first, second and fourth counterclaims. Therefore, it will not be necessary to take evidence on such counterclaims. (R. 94)

In its findings, conclusions and opinion, the court went out of its way to specifically find and approve as lawful in the Los Angeles area the very same facts and conditions of restraint and monopoly, which this Court and the district court in the government case held to be violative of the antitrust laws.

The Los Angeles district court found that in Los Angeles there existed the same vertical combination control by the picture companies of the first-run theatres, and that there existed the same system of runs and clearances by which the "cream" first run business was monopolized and independent exhibitors restrained and excluded, as was found by the district court and affirmed by this Court in the government case.

Specifically, the district court in this case found that—

> For many years in Los Angeles it was the established practice for each of the major motion picture producers to own and operate its own first-run theatre in downtown Los Angeles for the purpose of the initial run of pictures produced by the respective companies. (R. 101)
>
> . . . . . .

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Over the years producers and distributors have founded a course of conduct based upon the rights to exhibit films, first, second or third run within a given community.

Certain specified theatres have had the right of third-run; others have had the right of second-run, while still others have had the right of first-run.

Producers and distributors have also built up a policy of clearance between the end of the first run and the beginning of the second run, the end of the second run and the beginning of the third run. (R. 102)

These findings are closely parallel to those of the District Court in the government case on the same subjects. The district court in that case stated:

But here we are presented with a conspiracy among the defendants to fix prices, runs and clearances which we have already pointed out was powerfully aided by the system of vertical integration of each of the five major defendants. Such a situation has made the vertical integrations active aids to the conspiracy and has rendered them in this particular case illegal, however innocent they might be in other situations. . . . Here, the vertical integrations were a definite means of carrying out the restraints and conspiracies we have described. Moreover, we concluded in our prior findings, and the Supreme Court has affirmed our conclusion, that the distribution practices of the defendants constituted an attempt to obtain a monopoly in exhibition forbidden by the Sherman Act, . . .

In respect to monopoly power, we think it existed in this case. As we have shown, the defendants were all working together. There was a horizontal conspiracy as to price-fixing, runs and clearances. The vertical integrations aided such a conspiracy at every point.

. . . . . .

If an intent to exercise the power be thought important, it existed in this case, as we noted above in finding an attempt to monopolize. (*United States* v. *Paramount*, 84 F. Supp. 893-894.)

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Although in this case the court stated "we find no substantial evidence of a conspiracy", it actually found the facts which constitute conspiracy. It stated that the distributors had solved the problem of distribution of pictures among exhibitors by a "code of conduct" which had been developed and adopted by all of the major companies, for the regulation and allocation among exhibitors of runs, clearances, minimum admission prices, etc., and that the system of runs, clearances and fixed admission prices, had been "built up", "founded" and "established" by the distributors, as a "course of conduct" and "policy". (R. 79-80, 82, 84, 102) The inconsistency between the finding of no conspiracy and finding the constituent parts of conspiracy, was probably due to the failure of the court to realize the significance of the specific facts.

The court decided that this system of runs, clearances and fixed admission prices was not a conspiracy nor unlawful because the system was necessary, and that "as a matter of necessity" the distributors were forced to develop and apply a scheme and plan of distribution by which the runs and preferences in the exhibition of pictures were allocated. (R. 80, 81, 102, 106)

REASONS FOR ALLOWANCE OF THE WRIT

Dismissal of the Treble Damage Claims Without Trial Deprived Petitioners of Their Property Without Due Process of Law.

The right of petitioners to recover treble damages by reason of injury to their property and business, was a valuable property right. In sustaining the counterclaims as well pleaded and valid, the district court recognized the right of petitioners to a trial of the claims and to recover the damages proved.

Short of permitting petitioners to file the counterclaims and sustaining them as lawful claims, no more complete denial of due process of the law could occur. Dismissal of the counterclaims originated entirely with the trial judge, without any request therefor from the counterclaim defendants, without any previous notice to or knowledge of peti-

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tioners, without any hearing of any kind granted to any of the parties, without according petitioners at any time any opportunity whatever to present evidence in support of the claims, without requiring any evidence in rebuttal of the claim, and without the disclosure of any reason for dismissal by the district court except the brief statement that "we find no substantial evidence of a conspiracy in this case". (R. 94) The Court of Appeals likewise has failed to state any reason except the per curiam statement that the district judge "has thoroughly discussed the issues."

The judgment, in so far as it dismissed the counterclaims, was therefore void.

Mullane v. *Hanover Bank,* 339 U. S. 305, 313, 314;

Betts v. *Brady,* 316 U. S. 455;

Morgan v. *United States,* 304 U. S. 1, 18-20;

Powell v. *Alabama,* 287 U. S. 45;

Windsor v. *McVeigh,* 93 U. S. 274.

> Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. (93 U. S. 277)

The right to be heard is a constitutional right, and the entry of judgment against a party without hearing is a deprivation of due process of law.

American Surety Co. v. *Baldwin,* 287 U. S. 156, (1932);

In re Aughenbaugh, 125 F. 2d 887 (C. C. A. 3, 1942);

Osage Oil Refining Co. v. *Continental Oil Co.,* 34 F. 2d 585 (C. C. A. 10, 1929);

Wagoner National Bank v. *Welch,* 164 Fed. 813 (C. C. A. 8, 1908).

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This arbitrary dismissal of the counterclaim converted the action of the district court separating the two cases for trial and excluding the evidence of conspiracy, especially the exclusion of the judgments in the *Paramount* case as evidence of the conspiracy, into an injustice and a serious aggravation of the wrong. Moreover, it deprived petitioners of the very important right accorded by section 5 of the Clayton Act to use those judgments as *prima facie* evidence in the trial of their counterclaims.

Emich v. *General Motors Corp.*, 340 U. S. 558;
De Luxe Theatre Corp., v. *Balaban & Katz*, 95 F. Supp. 983, 986.

So far as the issue of conspiracy and the counterclaims were concerned, therefore, petitioners were effectively foreclosed, completely surprised and rendered helpless.

The injustice and illegality was further aggravated by the fact that the dismissal of the counterclaims was the result of a wholly one-sided procedure. As only one of the seven counterclaim defendants was a party to the eviction suit, no valid judgment on the counterclaims favorable to petitioners could, under any circumstances, have been awarded against respondents in the eviction suit. To be valid the decision against conspiracy must imply that a decision the other way was possible if supported by the evidence. A trial like that in this case in which only one of the parties could possibly prevail, is not a constitutional trial.

Another incongruity: the eviction suit arose under the California statute, and was in the district court on diversity of citizenship; whereas the counterclaims were in the district court under federal statutes. In effect, therefore, a California court has entered a judgment dismissing another action arising under federal law and pending in the United States district court.

It is evident that the court of appeals has not considered or decided at least two important questions in this case—

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(1) whether the dismissal of the counterclaims without trial lacks due process of law, and (2) whether it was not clearly erroneous to dismiss the counterclaims on the ground that the conspiracy on which they were based had not been proved, without receiving the judgments in the *Paramount* case which had been introduced in evidence by respondents, as conclusive evidence, or at least as *prima facie* evidence, of the conspiracy in the case on which the counterclaims were based.

In the *per curiam* affirmance, the court of appeals states that it affirms the judgment "for the reasons given" in the opinion of the district court. But there is no reason given in that opinion which even attempts to justify as valid the dismissal of the counterclaims without trial, or to justify as valid the failure to attribute any evidentiary value to the judgments as to conspiracy. The district court did not discuss, consider or explain its action in this regard. Those questions did not, of course, arise during the trial, which was confined to the eviction suit, nor until the dismissal occurred at the end of that trial. That action could not reasonably have been, and was not in fact, foreseen by petitioners, and no hearing of any kind on those questions has at any time been accorded by the district court. It follows that, if the court of appeals acted merely upon the "reasons" upon which the district court acted, both courts have ignored these two important questions.

It follows, also, that the court of appeals has reviewed the district court merely as to decisions of fact, and has concluded that its factual decisions were not clearly erroneous, although, as shown, grave questions of law only were presented. Petitioners made no complaint of any important facts found by the district court, as distinguished from some factual conclusions. As to facts, their complaint in the court of appeals was that the district court had no jurisdiction to find any facts as to conspiracy; that if the district court did have jurisdiction to find facts as to the conspiracy, it found the constituent facts which amounted to

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conspiracy and then made an erroneous conclusion from those facts against conspiracy; that, as any evidence disproving conspiracy which may have been received was received in a case to serve a wrongdoer, which it was contrary to public policy to entertain, no finding on the subject of conspiracy could be a valid bar to petitioners' counterclaims.

The Judgment Dismissing the Counterclaims Was Entered In Proceedings Instituted To Serve A Self Accusing and Adjudicated Law Violator.

The basic error in this case was to entertain the plea of the landlord upon the basis of his own unlawful conduct. He alleged that the restrictions imposed by him on the tenant of the theatre were unlawful, introduced the judgments in the *Paramount* case to prove the charge, and asked the district court to make the same decision made against him in that case (subject to the limitation stated *supra*, pp. 9, 12), and award him a judgment against the tenant for that reason. In *Warner Bros.* v. *Cooper Foundations*, 189 F. 2d 825, 829, the Court of Appeals refused to favor such a wrongdoer.

> While this is not an action to enforce or recover on an illegal contract the only right which the plaintiff has, the only right it could have, grows out of one. . . . The plaintiff pleaded the contracts which constituted the illegal arrangement. It could not make its case without proving them.

Little time and attention was needed to discover that the landlord based his claim on his own wrong, because it was definitely alleged on the face of his complaint; and not only was the unlawful character of the conduct undisputed, it was strenuously asserted by the landlord. The suit should, therefore, have been summarily dismissed. This case is a good illustration of the unwisdom, waste and injustice involved in violating the rule that courts should not listen to wrongdoers. This landlord and tenant case, brought

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under the California three-day eviction statute, occupied the attention of the district court during more than four years, from May 1, 1947, to June 18, 1951, (R. 26, 111)—in interluctory proceedings and hearings on thirteen different occasions and in eighteen daily trial sessions of the court, all of which required the preparation, submission and consideration of numerous briefs and legal memoranda. Eighteen persons were required to leave their own affairs and attend as witnesses. An expensive transcript of proceedings of more than three thousand pages, was accumulated. And in the end the case was decided on facts appearing on the face of the complaint and on a ground urged by petitioners at the earliest stage of the case, i.e., that the judgment in the *Paramount* case had no application to the franchise. (R. 77, 105)

The fact that the court refused eviction does not mean that it was not violating the rule against aiding wrongdoers in entertaining the suit. The court had no right to consider whether the landlord's self accusation was true or false. It was the duty of the court to take the landlord at his word. At most, the court merely decided that only a small portion of the conduct of the landlord, considered out of the environment and context of which it was a part, was lawful.

The Finding That the Franchise Was Lawful Standing Alone Is Not Conclusive of the Existence of the Conspiracy on Which the Counterclaims Were Based.

The reasoning of the district court evidently was that as the admission price fixing, exclusive dealing, and clearance provisions in one contract for one theatre were lawful, and as the pictures on which petitioners claimed to have paid excessive monopoly license fees were furnished pursuant to that contract, those provisions could not become unlawful simply because they were multiplied in many other contracts, nor, for the same reason, could the license fees be questioned in a treble damage suit.

The district court made at least four important decisions preceding the judgment based upon the elementary distinc-

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tion between the legality of acts standing alone and as part of conspiracy, especially the decision separating the eviction suit and the counterclaims for trial, with which its judgment was at variance.

Those decisions were to the effect that the issues in the eviction suit, i.e., first, whether the franchise had been prohibited by the judgment in the *Paramount* case, and later, whether the franchise was lawful standing alone, were distinct and different from the issues in the counterclaims, i.e., ~~first, whether the franchise had been prohibited by the judgment in the *Paramount* case, and later, whether the franchise was lawful standing alone, were distinct and different from the issues in the counterclaims, i.e.,~~ whether Paramount had engaged in the conspiracy in restraint of trade, and whether by reason thereof petitioners had been injured in their property and business. Those decisions were:

1. The decision striking from petitioners' answer in the eviction suit the defense that the landlord was engaged in the conspiracy in the *Paramount* case, and was attempting to evict the theatre tenant in pursuance of that conspiracy. The ground of this decision was that, as to the right of the landlord to recover possession of the theatre, the conspiracy was immaterial, and to urge it was an improper collateral attack on that right; in a word, that the issue in the eviction suit was not conspiracy and was not affected by the conspiracy.

2. The decision sustaining the counterclaims as well pleaded and valid.

3. The decision separating the two cases for trial, and the actual separate trial of the eviction suit.

4. The decisions limiting the evidentiary effect of the judgments in the *Paramount* case, when introduced by the landlord in the eviction case, to the fact that they contained a prohibition of franchises, and refusing to treat them as

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evidence of the conspiracy on which they were based and which they enjoined, or as evidence that Paramount was a participant in that conspiracy.

In effect, the district court has inverted the elementary rule that where there is a conspiracy in restraint of trade, "The plan may make the parts unlawful" (*Swift & Co.* v. *United States*, 196 U. S. 375, 396), and has decided that where one part is lawful standing alone, the plan is lawful. This distinction between the legal character of the parts separately and collectively, although specifically pointed out by this Court as applicable to the price fixing provisions of motion picture contracts, in *United States* v. *Paramount*, 334 U. S. 131, was disregarded by the district court. This Court said:

> For here too the licenses are but a part of the general plan to suppress competition. The case where a distributor fixes admission prices to be charged by a single independent exhibitor, no other licensees or exhibitors being in contemplation, seems to be wholly academic. . . . (334 U. S. 144)

Even if the fact that the pictures on which the monopoly film rentals were charged were furnished pursuant to a contract containing provisions which are lawful apart from conspiracy, would prevent a recovery of treble damages based on the film rentals, it does not follow that no recovery could be had when it shall be shown that those provisions were in fact parts of a conspiracy in restraint of trade. Petitioners have been deprived of their right to show that the price fixing and other restrictions of the contract were in fact parts of such a conspiracy.

The particular kind of contract on which petitioners licensed pictures, and the particular kind of lease on which they held the theatre, was immaterial to their claim for treble damages. That claim was based on the fact that they licensed the pictures and leased the theatre, that the picture and theatre rentals were affected by the conspiracy in restraint of trade, and that having paid license fees and

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theatre rentals under those conditions they were injured in their property and business by excessive charges.

Paterson Paper Co. v. *Story Paper Co.*, 282 U. S. 555, 561-562;
Ellis v. *Inman, Poulsen & Co.*, 131 Fed. 182, 186;
Gibbs v. *McNeeley*, 118 Fed. 120, 126;
Lowry v. *Tile Association*, 115 Fed. 27; aff. 193 U. S. 38;
Straus v. *Victor Talking Machine Co.*, 297 Fed. 791, 802-803.

The Court of Appeals Has Approved As Lawful the Very Same Restraints of Trade Disapproved As Unlawful By This Court and Prohibited By the Judgment In the Paramount Case.

Although, as has been shown, the subject of conspiracy was not an issue in this case, and petitioners have had no opportunity whatever to prove conspiracy, and conclusive evidence of conspiracy was excluded, almost half of the findings of fact and almost two-thirds of the text of the opinion of the district court, deal with that subject and decide that no conspiracy existed. (R. 79-90, 101-106)

The findings and opinion show that in the Los Angeles area the major picture distributing companies are continuing to practice the same system of runs and clearances and allocation of pictures among the exhibitors, the same vertical combination control by the major picture distributing companies of the first run theatres, the same preferential licensing of first run pictures to the vertical combination theatres and the same discrimination against independents, which were found by the district court and this Court in the *Paramount* case to exist on a nationwide scale, including Los Angeles, and to be the result of conspiracy and therefore unlawful.

Indeed, the judgments in the *Paramount* case which were introduced in evidence in this case by respondents were conclusive evidence of all of these facts, and should have been used as the basis of findings to that effect, for it was not

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permissible to receive those judgments on the curtailed basis which was approved by the court. Even for petitioners' treble damage counterclaims those judgments were *prima facie* evidence of the same facts, and the court was required to so receive and consider them in making any adjudication on the counterclaims.

The findings and opinion of the Los Angeles district court show that it also agreed with the district court and this Court in the *Paramount* case in their decision that this system was the result of conspiracy. Although the court in the present case said "we find no substantial evidence of conspiracy in this case", it specifically found the facts which constitute conspiracy. Thus, it said that a "code of conduct" a "scheme of distribution", a "course of action", and a "plan", had been "accepted and adopted", and "built up", by all of the major distributing companies, and was then in effect, for allocating the runs and clearances, and fixing minimum admission prices, etc., for theatres in the entire Los Angeles area. (R. 79-82, 101-103)

The Los Angeles court found that this system of runs and clearances was "a matter of necessity" because "some adequate scheme of distribution must be developed". (R. 80, 102)

The district court said:

> Obviously, it would be impossible for one motion picture producer to print sufficient film to permit distribution simultaneously to all theatres in the nation. Some plan had to be devised by which a few prints could be made and then prorated to exhibitors for use. (R. 80)

The statement implies, what is not correct, that someone in this case has made a contention that the illegality of the conduct of respondents was in not providing enough pictures for simultaneous use in all theatres. The error in the decision as to conspiracy, is that it was lawful for the distributors to devise and adopt the *conspiracy plan* for proration of the prints among exhibitors.

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While neither the findings nor opinion of the court literally so state, it is clear that the basis of the decision that the concertedly developed and operated run and clearance system did not constitute an unlawful conspiracy, was (1) that the system was "a matter of necessity", and (2) that no exhibitor "has the right, as a matter of law, to demand from a motion picture producer the right of prior runs". (R. 87, 102) The court has thus ruled, in effect that conspiracy and monopoly methods are necessary for the distribution of motion pictures in the Los Angeles area, that it is lawful for the distributors to choose their customers for the several runs according to the conspiracy method, and that exhibitors have no right to an opportunity to procure pictures by any other system.

The *per curiam* affirmance of the judgment in this case has made the opinion of the district court an authoritative and unqualified approval of the system of runs and clearances condemed as unlawful by this Court in the *Paramount* case. The Court of Appeals has accepted and approved the decision of the district court without qualification. The decision of the Court of Appeals, in full, is as follows:

> The Honorable Harry C. Westover, United States District Judge, has thoroughly discussed the issues of the above entitled case in an opinion printed in 97 Fed. Supp. 552, and we affirm the judgment for the reasons given therein.

This nullification of the benefit and authority of the *Paramount* case in the ninth circuit will make it impossible for any motion picture exhibitor injured by reason of the conspiracy and restraint in that case, to prevail in any suit for damages or injunction, now pending or hereafter instituted in that circuit, against the major picture distributors. About ten such cases are now pending in the Los Angeles court alone.

To that extent and in a large area of the country, at least, the decision of the court of appeals will vitiate a great public policy. The treble damage section of the Sherman

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and Clayton Acts were enacted as an aid in the achievement of the objects of the antitrust laws, and, with suits by the Attorney General for injunction and criminal prosecutions, is one of the three principal and co-equal methods provided by Congress for protection of the public against the formidable evils of restraints of trade and monopoly. As pointed out by this Court in *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 751, the right to treble damages—

> stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the government of cost of enforcement. . . . It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold * * *.

So, also, the decision of the court of appeals will make it difficult, probably impossible, to enforce in that circuit the prohibitions of the judgments in the *Paramount* case intended to end the conspiratorial run and clearance system as well as the many other restrictive practices imposed on independent exhibitors.

As appears from two other cases—*Chorak* v. *RKO*, 196 F. 2d 225, and *Fanchon & Marco* v. *Paramount*, 100 F. Supp. 84—that conspiracy and those practices in the Los Angeles area have survived the judgments in the *Paramount* case. According to the opinion in the *Fanchon & Marco* case, the same restraints and monopoly conditions were still prevalent in that area later than the middle of 1951, four years after the first judgment and three years after the second.

In the Los Angeles area there are about 300 motion picture theatres, which constitute the customers seeking to procure pictures from the major picture companies. Fox West Coast Theatres Corporation, owned by Twentieth Century-Fox Film Corporation, a defendant in *United*

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States v. *Paramount*, 334 U. S. 131, is the largest operator and licensee of pictures in the area, with about 250 theatres, and is incomparably the largest renter of films in the area, paying about sixty percent or more of the total picture license fees. (*Fanchon & Marco* v. *Paramount*, 100 F. Supp. 87.)

There are about thirty-two first run theatres in the Los Angeles area, which in revenue represent the "cream" of the business. Fox operates seventeen, and four other major picture or theatre companies, defendants in *United States* v. *Paramount*, operate fourteen. Paramount has an interest in the other theatre, of which it has been required to divest itself by the judgment in the *Paramount* case.

The rest of the theatres in the area are owned and operated by independent exhibitors, most of whom own but one, and sometimes two and three theatres. In virtually every part of the area, the small independent exhibitors are near, and must compete against, one or more of the Fox West Coast houses, both for the pictures to show in their theatres, especially for the valuable first and second runs, and for public patronage for their theatres. In the competitive struggle for pictures, the small operators are still impeded and frustrated by unlawful exclusions and restrictions shown by the *Chorak* and *Fanchon & Marco* decisions and disapproved in *United States* v. *Paramount*, 334 U. S. 131; 66 F. Supp. 323; 85 F. Supp. 881. As this Court stated in that case.

> The trade victims of this conspiracy have in large measure been the small independent operators. They are the ones that have felt most keenly the discriminatory practices and predatory activities in which defendants have freely indulged. They have been the victims of the massed purchasing power of the larger units in the industry. (334 U. D. 162)

In the *Chorak* case the Court of Appeals for the Ninth Circuit also affirmed a judgment denying damages to an exhibitor despite the uniform and unanimous refusal of

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the major picture companies to furnish pictures for his theatre on an equal basis with his large competitor. (Certiorari denied by this Court on November 17, 1952; Justices Reed, Black and Douglass dissenting; 73 S. Ct. 186.)

In *Fanchon & Marco* v. *Paramount,* 100 F. Supp. 84, the district court at Los Angeles held that the uniform and unanimous refusal of the same picture companies to furnish pictures to an exhibitor for first run use on an equal basis with the largest theatre combination in the area, was "economically wise" and therefore lawful. Speaking of the conspiratorial run and clearance system, the district court in that case said

> No cases exist which hold that the system, *in itself,* is a violation of the antitrust laws. To the contrary, all the decisions which have come from the higher courts postulate the legality of these restrictions, condemning only unreasonableness in the preference. (100 F. Supp. 89)

The case is now pending on appeal to the Court of Appeals for the Ninth Circuit, but in view of the decisions in this case and the *Chorak* case, it will undoubtedly be decided in the same way by the Court of Appeals, unless the present case shall be reviewed and reversed by this Court.

The opinions in these two cases and in the present case, are the only reported decisions of the Los Angeles district court and of the Court of Appeals for the Ninth Circuit, in motion picture treble damage and injunction cases. The opinion in the *Fanchon & Marco* case has also become a leading authority in the ninth circuit, although not an opinion of the Court of Appeals but of the district court, because the Court of Appeals in its opinion in the *Chorak* case has approved and largely used the *Fanchon & Marco* case as the basis of its own decision, although that case is now pending on appeal and has not yet been argued or considered there.

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CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners.

February, 1953.

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FILED
SEP 17 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 17

PARTMAR CORPORATION AND FANCHON & MARCO, INC.,
Petitioners,

v.

PARAMOUNT PICTURES THEATRES CORPORATION, ET AL.,
Respondents.

BRIEF FOR PETITIONERS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September, 1953

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OPINIONS BELOW

The opinion of the District Court is printed at Record p. 70, and is reported at 97 F. Supp. 552. A per curiam opinion of the Court of Appeals is printed at Record p. 432, and is reported at 200 F. 2d 561.

JURISDICTION

The jurisdiction of this Court is based on section 1254 of the Judicial Code. (28 U. S. C. A., sec. 1254). The judgment of the Court of Appeals was entered on December 16, 1952, and a petition for certiorari was granted by this Court on May 25, 1953, No. 641, 345 U.S. 963.

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STATEMENT

On May 1, 1947, Paramount Pictures Theatres Corporation brought a landlord and tenant suit in the United States District Court at Los Angeles to evict Partmar Corporation from a motion picture theatre in Los Angeles, which it occupied under a lease from Paramount and in which it was engaged in the motion picture exhibition business. The action was brought in the federal court because of diversity of citizenship. In the action Partmar filed counterclaims against Paramount and new parties were brought in as counterclaim defendants, for treble damages under the antitrust laws, based on the fact that Paramount and the others had been engaged in the unlawful restraint and monopolization described in *United States* v. *Paramount,* 334 U. S. 131, and that by that restraint and monopoly had compelled Partmar to pay excessive theatre rentals and license fees for pictures needed for the operation of the business. (R. 27) By order of the District Court, the eviction suit and the counterclaims were separated for different trials. (R. 44) After a trial of the eviction suit alone, eviction of Partmar was denied. (R. 109) Without any trial of the counterclaims, which had previously been held by the court to be well pleaded and valid, they also were dismissed with prejudice, in the judgment denying eviction. (R. 109, 115) The dismissal of the counterclaims was affirmed per curiam by the Court of Appeals for the Ninth Circuit. (R. 432)

Petitioners contend that dismissal of the counterclaims without trial was contrary to due process of law, and that the dismissal cannot be sustained on principles of *res judicata.*

The complaint in the eviction suit alleged that on August 30, 1939, Paramount *Pictures,* Inc. (the predecessor in title of Paramount Pictures *Theatres* Corporation, the plaintiff in the eviction suit), made a lease of the theatre to Partmar for a term ending March 18, 1952, subject to earlier termination at the option of the landlord, if a contract by Paramount Pictures, Inc., for furnishing motion

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pictures to Partmar for use in the theatre should be terminated "for any reason whatsoever". (R. 9-10, 211-212.)

Fanchon & Marco, Inc., the other petitioner, owns all of the stock of Partmar, and was sued in the eviction case as a guarantor on the lease.

The contract for furnishing pictures had been entered into simultaneously and ran coterminously with the lease. In the complaint it was called a "franchise". (R. 8) It granted a general license to Partmar for the use of Paramount pictures in the theatre, and required that pictures of that company should be used in the theatre for forty-six weeks of each year. It granted no license for any specific pictures, merely providing for making specific contracts on a one year basis during the life of the franchise.

On September 29, 1944, Paramount Pictures, Inc., conveyed the title of the theatre and assigned the lease to Paramount Pictures Theatres Corporation, of which it owned all of the stock. (R. 12)

It was alleged that on December 31, 1946, the United States District Court for the southern district of New York, in *United States* v. *Paramount Pictures et al.*, had entered a judgment that Paramount had violated the Sherman Act, and had enjoined the further performance of any franchises; i.e., any contract with an exhibitor for licensing pictures for exhibition, in effect for more than one motion picture season. (R. 13-14, 302.) The complaint alleged that as to franchises the judgment was "final".[1] The allegations of the complaint are clear and literal that the franchise had been enjoined as an unlawful part of the monopolization and conspiracy in *United States* v. *Paramount*—in the allegations that Paramount had been sued by the government for violation of the Sherman Act, that there had been a trial, and that a "final" judgment had been entered in the case against Paramount for violation of the

[1] The Los Angeles district court said in its opinion in the eviction suit, "Paramount knew this was not a final decree", that "Not only did Paramount know at the time notice of termination was given that the decision in 70 F. Supp. 53 was not a final decision, but it actively participated in an appeal to the Supreme Court from at least a part of that decree." (R. 75.)

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statute, in which the franchise and other practices had been enjoined. The complaint stated that the New York District Court decided "among other things, that all franchise agreements granted by Paramount Pictures and the other defendants therein, were, from their formation, and are an unlawful restraint of trade and were and are in violation of said Sherman Act." (R. 12-13.)

It was alleged that on March 26, 1947, Paramount Pictures, Inc. notified Partmar that the picture franchise had been terminated by the judgment in the government case; and on April 2, 1947, Paramount Pictures Theatres Corporation notified Partmar that it had exercised the option to terminate the lease, and demanded immediate possession of the theatre, which Partmar refused to yield. (R. 17)

There was no allegation that the tenant was not making rental payments or otherwise fully performing the terms of the lease.

Petitioners moved to dismiss the eviction suit on the ground that, as the franchise had been enjoined because of violations of law by the landlord's predecessor in title and its 100 percent stockholder, the court was being asked to grant relief to a wrongdoer based on his own wrong. The motion was denied. (R. 392, 423-424)

In their answer (filed July 10, 1947) petitioners admitted the allegations of the complaint that Paramount had been sued, tried and enjoined for violation of the Sherman Act, and admitted that certain franchises had been held to be unlawful and prohibited. But petitioners denied that the injunction had any application to the particular franchise for furnishing pictures to Partmar; and they denied that the injunction was final. (R. 28, 44.)

Petitioners set up as defenses that Paramount was a party to the conspiracy in *United States* v. *Paramount*, and was seeking to evict Partmar in pursuance of that conspiracy, that the effect of the eviction would be to drive Partmar out of business and enable Paramount to take

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over the theatre, and thus to increase and extend an unlawful control of theatres. (R. 27, 30-34, 392, 395, 422)

These defenses, which raised the issue of the existence of the conspiracy and of the connection between the conspiracy and some terms of the franchise and lease, were stricken out on motion, as an improper collateral attack on the right of the landlord to recover possession of the theatre. (R. 115, 424)

That decision established for the case, that there was an entire distinction between the controlling issues in the eviction suit and the controlling issue of conspiracy in the defenses.

The counterclaims were for treble damages and injunctive relief. (R. 36, 43) They were alleged to be based upon the conspiracy in *United States* v. *Paramount*. It was also alleged that as "part of the aforesaid conspiracy" Partmar had been required to license pictures from Paramount for 46 weeks of each year. (R. 38)

The damages claimed were for monopoly overcharges exacted by Paramount for pictures furnished for the theatre and for theatre rentals; that is, for the difference between the license fees and theatre rentals which would have been paid in an unrestrained and unmonopolized market, and the fees and rentals which had been paid under the conspiracy and monopoly conditions found in the government case to have been established by Paramount and others.

The counterclaims named as defendants seven parties who were not parties to the eviction suit—Paramount Pictures, Inc. and six of its principal officials. (R. 36)

On motion to dismiss the counterclaim, they were sustained as valid actions under the antitrust laws. Both actions—the eviction suit and the treble damage claims—were then at issue on the facts.

This decision sustaining the counterclaims was consistent with the decision striking the defenses, and implied the

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same distinction between the issues in the eviction case and the counterclaims. The decisions were, in effect, that conspiracy would not defeat the suit to recover possession of the theatre, but that the same conspiracy would sustain the counterclaims for treble damages and injunctive relief.

Shortly after the decision sustaining the counterclaims as valid, the eviction suit and the counterclaims were formally separated for trial, by order of the District Court, on motion of respondents. The order provided for entirely separate trials of the two suits, and for trial of the eviction case first. (R. 44-45)

The separation also recognized and was based upon the difference between the issues and the merits of the eviction suit and of the counterclaims. As petitioners agreed that this was correct, they made no objection to separate trials.

At this stage of the case, the whole basis of the eviction suit was suddenly swept away by the decision of this court on May 3, 1948, in *United States* v. *Paramount,* 334 U. S. 131. In that decision this Court reversed the prohibition of franchises and remanded the subject to the District Court. This Court said: "We cannot say on this record that franchises are illegal *per se* when extended to any theatre or circuit no matter how small." (p. 156) As that decision negatived the fact on which the eviction suit was based—termination of the franchise—petitioner moved for dismissal; this time on the ground that the case had become moot by the demonstrated nonexistence of the basic fact. The motion was denied. (R. 46, 404, 424)

In opposing this motion, Paramount made an about face and argued that the judgment in the government case had nothing to do with the eviction suit, that the eviction suit turned upon "the inherent validity or invalidity" of the franchise, wholly apart from the judgment of the District Court in the government case. As the reversal of the franchise injunction by this Court made it impossible to oust Partmar on the ground alleged in the complaint, Paramount deserted that ground and based the claim for re-

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possession on the radically different grounds (1) that the franchise was in unlawful restraint of trade, standing alone and apart from the conspiracy in the Paramount case, and (2) that the franchise had been terminated by Paramount for that reason and independently of the judgment in the government case. Specifically, it was asserted that the franchise was unlawful, standing alone, because it provided that Paramount should fix the admission prices to be charged at the theatre, required the theatre to use Paramount pictures exclusively, and provided for the imposition of clearances to be determined by Paramount. (R. 46-47)

This change of position very carefully, specifically and wholly excluded from the eviction suit, as immaterial, the character of the franchise in a setting of monopolization and conspiracy in restraint of trade. The District Court fully approved this new thesis as to the issue in the case. The district judge said:

> I am at a loss still to understand what the New York action has to do with this case unless it is merely to set a precedent which we can follow here * * * (R. 47)
>
> But here, the question is, was this franchise agreement legal or illegal under the Sherman Act. That is a question to be determined here, not in New York or somewhere else * * * (R. 47)

The change of issues and exclusion of conspiracy, was not accomplished by any change in the pleadings or by other formal procedure. As no amendment of the complaint or other procedural action was taken to make the change, it was not possible for petitioners to oppose or deny the new case by any responsive pleading. The case was to be tried, therefore, by rejecting the standard stated in the pleadings, and according to the general academic concept of the lawfulness or unlawfulness of the franchise *per se*. Accordingly, if the landlord should convince the court that the franchise was unlawful because of restraints imposed by

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the landlord or its parent picture corporation for their benefit, the court should award the landlord possession of the theatre, and turn the tenant out.

Petitioners perforce made their defense at the trial conformably to the case as thus devised by the landlord and sanctioned by the court. Petitioners, therefore, based their case upon the propositions (1) that the self-accusation of unlawful conduct by the landlord was unnatural and not permissible as a basis for judgment in his favor or even for any trial of the case, (2) that it was elementary that the franchise, standing alone and apart from the conspiracy, was lawful, and (3) that the cause of the restraints and monopoly conditions existing in the motion picture business in the Los Angeles area was not the franchise, but the monopolization and conspiracy shown in the government case.

The eviction suit trial began on November 8, 1950. For eighteen daily sessions of the court, it continued, and at length ended in a decision denying eviction.

The distinction between the issue in the eviction suit and the issue in the counterclaims—(1) illegality of the franchise standing alone, and (2) the conspiracy in the government case—was consistently maintained throughout the trial, and the order separating the two cases remained effective without change. No order or stipulation or procedure to the contrary occurred. At the opening of the eviction suit trial, counsel for the landlord said that both sides had prepared their case pursuant to the separation order—

> so that the evidence will proceed, so far as the plaintiff is concerned, and I believe it has been indicated by counsel for the Fanchon & Marco and Partmar group that they are prepared to proceed accordingly in pursuance of Judge Mathes' order for these separate trials. My opening statement, therefore related solely to this first separate trial on the unlawful detainer and I reserve the opening statement on the counterclaims to a later time—perhaps next month when we get to that, or earlier if we do so, and I understand that coun-

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sel for the defendants are preparing their presentation and their statements accordingly. (R. 118)

See also Record, pages 114, 115, 116, 117.

Accordingly, the opening statements of both parties were confined to the character of the franchise standing alone and apart from conspiracy. No witnesses were called and no evidence was presented by petitioners to establish, or by respondents to rebut, the counterclaims and the conspiracy upon which they were based, and no arguments or briefs for or against the counterclaim were at any time made or submitted to the court by any of the parties.

Judgments in the government case were introduced in evidence by the landlord. (R. 299, 312) The judgment of the district court in that case, of December 31, 1946, which contained the injunction against franchises on which the eviction suit was based, and which had been vacated as to franchises by this Court in its decision of May 3, 1948, and a second judgment of March 4, 1949, were offered and accepted, but subject to a limitation which nullified them as any evidence of the conspiracy in the Paramount case.

They were offered by the landlord "for the limited purpose only of showing Paramount as being subject to the injunctive features" of the judgments, "for the limited purpose of the court considering those portions of that decree pertinent to this case of the unlawful detainer." (R. 128-130) Petitioners objected to the limitation because it emasculated the judgments of their full and intrinsic, conclusive and legal evidentiary quality against Paramount. But the objection was overruled, and the Court expressly refused to give the judgment any evidentiary effect at all as to the existence of the conspiracy. In overruling the objection the trial judge said "when it comes your turn, if you want to introduce it or make a motion that it be received in toto, you can."[1] (R. 130-131) Peti-

[1] This ruling on evidence is referred to merely for the purpose of showing that the issue of conspiracy was not being considered by the court in the eviction suit. As petitioners prevailed in the eviction suit, they do not now attribute any significance to it as an erroneous ruling on evidence in that suit.

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tioners' "turn", which was to occur at the scheduled later trial of the counterclaims, never arrived, however, because of the preemptory dismissal of the counterclaims.

From time to time throughout the trial, the trial judge stated that no evidence of conspiracy had appeared in the case, thus making plain that the order separating the two cases for trial and postponing and excluding the issue of conspiracy until the later trial of the counterclaims, was being continuously observed. On the twelfth day of the trial the trial judge said:

> So far as this case (sic), there hasn't been one iota of evidence to indicate there was any conspiracy with Paramount, Fox, Warner Brothers, or any other producer or distributor.
>
> The only thing you have got in this case so far is the decision in the Supreme Court case in which it says, "In the country as a whole there is a conspiracy." They didn't say in Los Angeles there is a conspiracy.[1] It might be inferred, because Fox, Warner Brothers, Paramount, and the other producers operated in Los Angeles, there is a conspiracy, but so far there hasn't been anything to show that any agreement that was made by Paramount was made in conjunction with a similar agreement made by Warner Brothers or even with Warner Brothers' or Fox's knowledge that the agreement was being made. (R. 137-138)

On the seventeenth and next to last day of the trial, the trial judge said:

> So far, in this case, there hasn't been any evidence of any kind that there has been a conspiratorial relationship between Paramount and any other of the distributors or the exhibitors. (R. 142)

At the close of the trial of the eviction suit, on December 21, 1950, the trial of the counterclaims was postponed by the

[1] The logic here seems to be that the "whole" of the country does not include that "part" which is Los Angeles.

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court pending a decision of the eviction suit. In its opinion the district court stated:

> At the time of trial it was agreed that action on the counterclaims should be postponed until after the trial of the main issue involved, and no evidence was offered by either plaintiff or defendant on the counterclaims. (R. 94)

The eviction suit was not decided until May 2, 1951. In the meantime briefs were prepared and submitted to the court by the parties. The briefs on both sides considered only the question whether the franchise was a contract in unlawful restraint of trade, as a single contract, standing alone and apart from the conspiracy in the government case.[1] Respondents have designated for the Record the brief filed by petitioners, and it is printed at Record pages 45-70. That brief defines the issue as stated. (R. 45-47)

On May 2, 1951, the court decided the eviction case against the landlord, denying the eviction on the ground that the judgment in the government case had not terminated the franchise. (R. 93)

The court went further, however, and found that the franchise had not been made as a part of or a result of any combination or conspiracy between Paramount and others; and concluded that for that reason petitioners could not recover upon the counterclaims. (R. 104) The counterclaims were dismissed with prejudice. (R. 110) In its written opinion, the Court said:

> It appears that all of the counterclaims, with the exception of the third counterclaim, are based upon conspiracy. As we find no substantial evidence of a conspiracy in this case on the part of Partmar or Paramount, we are of the opinion that the counterclaimant cannot recover upon the first, second and fourth counterclaims. Therefore, it will not be necessary to take evidence on such counterclaims. (R. 94)

[1] The thesis of both briefs was, of course, unreal and academic. But as the court required the case to be tried on that thesis, petitioners had no alternative but to make the correct though academic contention that the franchise isolatedly considered was lawful.

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The findings of fact contain but two small fragments as to the character of the franchise standing alone: (1) that it was not the purpose or effect of the franchise to restrain or monopolize trade; and (2) that the admission price provision in the franchise was no more than one agreement between one exhibitor and one distributor applicable to but one theatre. (R. 104)

But the opinion of the district court shows that the question of the legality of the franchise standing alone, was considered, decided, and was decisive of the case. (R. 70)

The court first considered whether the judgment in the government case was a legal reason for termination of the franchise. It said "The first question presented to this Court is whether a decree, which is subsequently set aside, is a legal cause or reason for termination of the franchise agreement." (R. 75-76) It decided that the judgment "was not a legal cause or reason for terminating the franchise agreement." (R. 77)

The court next considered the question whether the franchise was violative of the antitrust laws standing alone and apart from the conspiracy. The court said:

> Plaintiff contends, however, that if it was not justified in terminating the franchise agreement because of the decree, nevertheless it did have a right to terminate the franchise agreement as it was an illegal agreement and was illegal from its inception and thus could be terminated at any time. Hence, we now proceed to the question of the legality of the franchise agreement. (R. 77)

Having considered that question, the court decided that "the franchise agreement is not *in itself* an illegal agreement". (R. 93) But the clear distinction between that question and the legality of the franchise as part of conspiracy, was emphasized by the court, as follows:

> If the parties to the franchise agreement had combined to restrain freedom of interstate commerce in the transportation, sale or exhibition of motion pic-

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tures, the position of plaintiff that the franchise agreement is void might be tenable * * * (R. 89)

The evidence in this case shows at most nothing more than one agreement on admission prices between one film company and one exhibitor, applicable to one theatre. (R. 89)

* * * * * * *

If plaintiff had established by competent evidence that the prices as set forth in the franchise agreement were, in general, uniform and used by other theatres as the result of a price fixing agreement by the film companies or the exhibitors, there would be some basis for the Court to sustain plaintiff's contention. However, a single contract between one film company and one exhibitor is not violative of the Sherman Act. (R. 89-90)

In its findings, conclusions and opinion, however, the Court dealt with the subject of conspiracy. It found and concluded that the franchise was not a part of or result of any conspiracy, as follows:

Paramount, not in conjunction with any other major studio, entered into the franchise agreement * * *. Neither said franchise agreement, nor said lease, nor any amendment to either of them constituted any part of, nor were they or any of them entered into as a result of any agreement, combination or conspiracy of any kind whatsoever between Paramount and any other person or persons, nor between Partmar and any other person or persons. (Finding 20, R. 103-104)

To the same effect, the court concluded:

Inasmuch as the said lease and franchise agreement and all amendments to each of them were in all respects lawful and were not entered into nor performed as a result of any combination or conspiracy of any kind whatsoever on the part of either plaintiffs, defendants, third party plaintiff or third party defendants, with any person or persons; * * * third party plaintiffs, and each of them, cannot recover upon the first, second and fourth counterclaim, or any of them. (R. 107-108)

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But the court also actually found the facts which constitute conspiracy. It stated that the distributors of pictures (among whom the counterclaim defendants are included) had solved the problem of distribution of pictures among exhibitors by a "code of conduct" which had been developed and adopted by all of the major companies, for the regulation and allocation among exhibitors of runs, clearances, minimum admission prices, etc., and that there was a system of runs, clearances and fixed admission prices, which had been "built up", "founded" and "established" by the distributors, as a "course of conduct" and "policy". (R. 79-80, 82, 84, 102)

The court decided that this system of runs, clearances and fixed admission prices was not a conspiracy nor unlawful because the system was necessary, and that "as a matter of necessity" the distributors were forced to develop and apply a scheme and plan of distribution by which the runs and preferences in the exhibition of pictures were allocated. (R. 80, 81, 102, 106)

The court found that there existed in Los Angeles a vertical combination control by the picture companies of the first-run theatres. Specifically that—

> For many years in Los Angeles it was the established practice for each of the major motion picture producers to own and operate its own first-run theatre in downtown Los Angeles for the purpose of the initial run of pictures produced by the respective companies. (R. 101)
>
> * * * * *
>
> Over the years producers and distributors have founded a course of conduct based upon the rights to exhibit films, first, second or third run within a given community.
>
> Certain specified theatres have had the right of third-run; others have had the right of second-run, while still others have had the right of first-run.
>
> Producers and distributors have also built up a policy of clearance between the end of the first run and the beginning of the second run, the end of the second run and the beginning of the third run. (R. 102)

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QUESTIONS PRESENTED

1. Where claims for treble damages for violation of the antitrust laws have been filed as counterclaims, and they have been sustained as valid and not otherwise barred, and a separate trial of the main action apart from and preceding a trial of the counterclaims has been ordered by the court, and the issue of fact and law in the counterclaims and the main action are different, and a separate trial of the main action has been had—may the court dismiss the counterclaims with prejudice at the end of the trial of the main action and without any trial of the counterclaims.

2. Whether an adjudication in one case, that one contract granting a license for the use of motion pictures in one theatre, which contains admission price fixing provisions and other restrictive conditions in favor of the licensor, is not, standing alone, violative of the antitrust laws is also in legal effect a conclusive adjudication that the contract is not part of a general conspiracy for fixing admission prices and imposing other restrictions on a nationwide scale, and therefore constitutes a bar to an action for treble damages based on such conspiracy.

3. Whether such an adjudication, bars treble damage claims under the antitrust laws by the licensee, for recovery of conspiracy and monopoly overcharges on the pictures which have been licensed under the contract for use in his theatre.

4. May a court entertain an action in which the plaintiff alleges that he has been guilty of violating the antitrust laws, and has been prohibited by the judgment of another court from continuing the violations, and in which the plaintiff seeks a judgment in his favor based on the fact of his violation.

5. Whether a system for the allocation of motion pictures among exhibitors for use in their theatres, by which practically every theatre in every community throughout the United States, including Los Angeles, is classified in

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a fixed position as to the run and clearance for which it may receive licenses for pictures—which system has been built up, accepted, adopted and practiced by the major distributors, who distribute eighty or more percent of the pictures, and according to which the theatres of the distributors receive practically exclusively the first and preferential use of the pictures—and which is effectuated by uniform and unanimous refusals of the distributors to license pictures to anyone on any other terms—constitutes a conspiracy in restraint of trade in violation of the anti-trust laws.

ARGUMENT

Dismissal of the Treble Damage Claims Without Trial Deprived Petitioners of Their Property Without Due Process of Law

The counterclaims are based on the fact that the only market in which petitioners could procure pictures for the operation of their theatre was restrained and monopolized by the unlawful action of respondents and others, and that they had to submit to the conspiracy and monopoly terms, conditions and rentals for pictures which were imposed by respondents, or get out of the business.

The view of the district court seems to be that unless the particular contracts on which the pictures were licensed to petitioners contained provisions which were in unlawful restraint of trade apart from the conspiracy and monopolization, no recovery for excessive charges attributable to the abnormal market conditions which the conspirators had created can be had.

The particular kind of contract on which petitioners procured pictures, and the particular kind of lease on which they held the theatre, was immaterial to their claim for treble damages. That claim was based on the fact that they licensed the pictures and leased the theatre, that the picture and theatre rentals were increased by the conspiracy in restraint of trade, and that having paid license

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fees and theatre rentals under those conditions they were injured in their property and business by excessive charges.

Bruce's Juices v. *American Can Co.*, 330 U. S. 743;
Paterson Paper Co. v. *Story Paper Co.*, 282 U. S. 555, 561-562;
Ellis v. *Inman, Poulsen & Co.*, 131 Fed. 182, 186;
Gibbs v. *McNeeley*, 118 Fed. 120, 126;
Lowry v. *Tile Association*, 115 Fed. 27; aff. 193 U. S. 38;
Straus v. *Victor Talking Machine Co.*, 297 Fed. 791, 802-803.

In the trial of the eviction suit, petitioners were not only given no opportunity to be heard or to present evidence in support of their counterclaims, but were affirmatively restricted and barred from such opportunity—among other things, by the order of the district court separating the eviction suit and the counterclaims for separate trials, by their obedience to that order, by the maintenance of that separation throughout the trial, and especially by the action of the court in receiving in evidence for respondents the judgments in the government case subject to the limitation that they should not constitute evidence of the conspiracy on which the counterclaims were based, and of which on those claims they are prima facie evidence under section 5 of the Clayton Act. The order thus became a device which deceived petitioners and caused them to remain inactive in the eviction suit as to the counterclaims, prohibited and disabled them from any action in that regard in the eviction suit, and then, with the judgment dismissing the counterclaims, penalized them for their inaction. No judgment entered in the eviction suit under such circumstances, could be conclusive against petitioners as to the counterclaims.

The right of petitioners to recover treble damages by reason of injury to their property and business, was a valuable property right. In sustaining the counterclaims as well pleaded and valid, the district court recognized the right of petitioners to a trial of the claims and to recover the damages proved.

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Short of permitting petitioners to file the counterclaims and sustaining them as lawful claims, no more complete denial of due process of law could occur. Dismissal of the counterclaims originated entirely with the trial judge, without any request therefor from the counterclaim defendants, without any previous notice to or knowledge of petitioners, without any hearing of any kind granted to petitioners, without affording petitioners at any time any opportunity whatever to present evidence in support of the claims, without requiring any evidence in rebuttal of the claims, and without the disclosure of any reason for dismissal by the district court except the brief statement that "we find no substantial evidence of a conspiracy in this case". (R. 94) The Court of Appeals likewise has failed to state any reason except the per curiam statement that the district judge "has thoroughly discussed the issues."

But the trial judge said that petitioners did in fact have "an opportunity" to establish conspiracy. In a short hearing on proposed findings, he said:

> You had an opportunity, and I thought you went into the matter very thoroughly * * * You weren't limited as to time. You spent lots of time up here trying to establish the facts. (R. 145)
> * * * you went on to say, "That there was a conspiracy, and as a consequence we are entitled to damages." (R. 145)

It is impossible, however, to reconcile these statements (1) with the fact that the court had stricken out as an improper collateral attack on the right to recover possession of the theatre, the defenses pleaded by petitioners which were based on the same facts on which the counterclaims were based, (2) with the fact that by a previous order of the court the eviction suit and the counterclaims were separated for trial, (3) with the fact that the court accepted, approved and enforced the thesis proposed by

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respondents that the trial should be confined to the question whether the franchise was in unlawful restraint of trade standing alone and apart from conspiracy, and (4) with the fact that the trial court ruled that the judgments in the government case offered in evidence by respondents as the essential basis of their right to eviction, should be limited to exclude the fact of conspiracy, of which, having been pleaded and offered by respondents, they were in law conclusive evidence against them.

In view of the fact that the judgments not only had this intrinsic conclusive evidentiary quality against respondents, but in a trial of the counterclaims would, under Section 5 of the Clayton Act, be prima facie evidence in favor of petitioners as to the conspiracy and all the other matters shown in *United States* v. *Paramount,* 334 U. S. 131, it is almost absurd to suppose that petitioners merely failed to use "an opportunity" to establish those facts.

Emich v. *General Motors Corp.,* 340 U. S. 558;
DeLuxe Theatre Corp. v. *Balaban & Katz,* 95 F. Supp. 983, 986.

The judgment, in so far as it dismissed the counterclaims, was therefore void.

Mullane v. *Hanover Bank,* 339 U. S. 306, 313, 314;
Betts v. *Brady,* 316 U. S. 455;
Morgan v. *United States,* 304 U. S. 1, 18-20;
Powell v. *Alabama,* 287 U. S. 45;
Windsor v. *McVeigh,* 93 U. S. 274.

> Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. (93 U. S. 277)

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The right to be heard is a constitutional right, and the entry of judgment against a party without hearing is a deprivation of due process of law.

American Surety Co. v. *Baldwin,* 287 U. S. 156, (1932);
In re Aughenbaugh, 125 F. 2d 887 (C. C. A. 3, 1942);
Osage Oil Refining Co. v. *Continental Oil Co.,* 34 F. 2d 585 (C. C. A. 10, 1929);
Wagoner National Bank v. *Welch,* 164 Fed. 813 (C. C. A. 8, 1908).

Full opportunity to be heard and compliance with other requirements of due process is essential to the conclusive effect and validity of a judgment.

Williams v. *North Carolina,* 325 U. S. 226, 230, 1946
McDonald v. *Mabee,* 243, U. S. 90.
Reynolds v. *Stockton,* 140 U. S. 254, 1891.

Any judgment in the eviction suit except a judgment limited solely to dismissal of that suit, was beyond the jurisdiction of the court, and, therefore, void. Inasmuch as the court had no jurisdiction to award any relief to the landlord which required a finding of violation of the anti-trust laws by the landlord, it was without jurisdiction to entertain and try the suit. A proceeding in which no judgment may be awarded to a plaintiff unless he succeeds in establishing that he was or is a law violator, is repugnant to the only proper function of a court, which is the administration of the law and not the serving of wrongdoing or unlawfulness. It is contrary to due process of law to require any defendant to defend such a suit.

This case is a good illustration of the unwisdom, waste and injustice involved in violating the rule that courts should not listen to wrongdoers. This landlord and tenant case, brought under the California three-day eviction statute, occupied the attention of the district court during more than four years, from May 1, 1947, to June 18, 1951 (R. 26, 111)—in interlocutory proceedings and pre-trial and other

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hearings on thirteen different occasions and in eighteen daily trial sessions of the court, all of which required the preparation, submission and consideration of numerous briefs and legal memoranda. (R. 423-424) Many persons were required to leave their own affairs and attend as witnesses, and an expensive transcript of proceedings of more than three thousand pages was accumulated. The fact that after all these proceedings the court refused eviction does not mean that it was not violating the rule against aiding wrongdoers in entertaining the suit. The court had no right to permit the landlord to present evidence, or otherwise to urge, that he had been guilty of law violation, and to impose upon the tenant the burden of controverting that position on pain of eviction. Due process required the court to take the landlord at his word and dismiss the suit.

> It is trite in our jurisprudence that contentions originating in unlawful purposes are not to be brought into courts of justice. * * * A controversy of this character can find no adjustment here, but the parties will be left as they stand.
>
> *Fabacher* v. *Bryant,* 46 La. Ann. 820, 826, 1894.
> *Warner Bros.* v. *Cooper Foundation,* 189 F. 2d 825, 829.

The Judgment Dismissing the Counterclaims is not Valid on Principles of Res Judicata

In barring a trial and recovery upon the counterclaims, the judgment, in effect, applies the rule of *res judicata* without complying with the requisites of that rule.

The use of a judgment in one action in bar of another action has occurred, so far as we have discovered, only when the second case has been instituted after or apart from the first case; and where the judgment in the first case has contained no express reference to the second case, and has not purported to be an adjudication against the second action by any specific identification of that action. The bar of the first judgment has been applied only at the instance and request of the party entitled to the

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bar, who in every case has of his own motion pleaded or otherwise formally brought the former judgment to the attention of the court. In those cases the proponent of the former judgment has also borne the conventional burden of proof to establish the existence, validity and controlling application of the first judgment to the second action. But in this case both judgments are combined in one judgment, the second action is expressly identified and expressly barred therein without any request or expectation therefor by any party in the case, and the beneficiary of the bar has been wholly relieved of any burden of proof or other requirement of lawful procedure.

It is improper for the court to bar an action on the basis of a former judgment, where it has not been asked to do so. The privilege to invoke the bar belongs to the party, who may, for reasons of his own, choose to ignore or waive the benefit of the former judgment.

Garden Club v. *Murrell,* 180 F. 2d 435, 436, CA 5, 1950; cert. den. 342 U. S. 299.
Donald v. *Lumber* Co., 68 F. 2d 441, 442, CA 5, 1934.
Pratt v. *Wilcox,* 64 F. 589, 592, 1893.

The dismissal of the counterclaims was also the result of a one-sided procedure. As a matter of law, the counterclaim defendants except the landlord, were not present at the trial of the eviction suit to which they were not parties, and they were not present in fact. (R. 129) As only one of the seven counterclaim defendants was a party to the eviction suit, no valid judgment on those claims favorable to petitioners could, under any circumstances, have been awarded against all the parties. For this dismissal to be valid it is necessary that it should also have been possible for petitioners to procure a valid judgment in the eviction suit on the counterclaims against all the counterclaim defendants. A procedure like that in this case in which only one of the parties could prevail, is not a constitutional procedure.

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There must be mutuality of estoppel. Hence, a judgment for or against one who is not a party to the litigation, is invalid and is not conclusive for or against him.

Robertson v. *Gordon,* 226 U. S. 311, 1912.
De Luxe Theatre Corporation v. *Balaban & Katz,* 88 F. Supp. 311.

No proper issue in the eviction suit was controlling as to the counterclaims. The correct and only proper issue in the eviction suit was whether the landlord was seeking relief upon the basis of his own wrongdoing.[1]

Little time and attention was needed to discover that the landlord based his claim on his own wrong, because it was definitely alleged on the face of his complaint; and not only was the unlawful character of the conduct undisputed, it was strenuously asserted by the landlord.

In *Warner Bros.* v. *Cooper Foundations,* 189 F. 2d 825, 829, the Court refused to favor such a wrongdoer.

> While this is not an action to enforce or recover on an illegal contract the only right which the plaintiff has, the only right it could have, grows out of one. * * * The plaintiff pleaded the contracts which constituted the illegal arrangement. It could not make its case without proving them.

The case should, therefore, have been summarily dismissed.

A former judgment is conclusive of a second case only (1) where both actions are based upon the same claim or

[1] Although Paramount Pictures Theatres Corporation, the landlord, and Paramount Pictures, Inc., the picture company, were different corporations, there was no factual distinction between them. The lease and franchise were originally made by the picture corporation. It organized and always owned all the stock of the theatre corporation. It conveyed the title of the theatre property, and assigned the lease thereof, to the theatre corporation. Both had the same business headquarters in New York City; both had the same officers and directors; and both were represented in this case by the same counsel. Both judgments in the government case offered in evidence by the landlord expressly applied to the landlord, in the statement that "Each of the defendant distributors, Paramount Pictures, Inc., * * * and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined:" etc. (R. 12, 113, 191, 221, 244, 293, 301, 312.) The district court disregarded the abstract distinction between them, in the finding that "Though contained in two separate documents the lease and the franchise agreement constituted but one agreement between the parties." (R. 97)

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demand, or (2) where they are upon different claims and the first action has required, and there has actually occurred in that action, the determination of a matter which is essential in the second.

United States v. *International Co.*, 345 U. S. 502, 505-506, 1953.
Emich v. *General Motors*, 340 U. S. 558, 568-569.
Vicksburg v. *Henson*, 231 U. S. 259, 1913.
Reynolds v. *Stockton*, 140 U. S. 254, 1891.
Barnes v. *Chicago Ry. Co.*, 122 U. S. 1.
Cromwell v. *County of Sac*, 94 U. S. 351.
Russell v. *Place*, 94 U. S. 606.

The only other issue which arose on the pleadings was whether the judgment in *United States* v. *Paramount*, 334 U. S. 131, applied to the franchise. The decision of this Court in that case on May 3, 1948, reversing the judgment as to franchises, rendered that issue entirely moot. Again, therefore, the suit should have been summarily dismissed.

The issue thereafter devised and tendered merely in oral argument by the landlord, i.e., whether the franchise was in unlawful restraint of trade standing alone, was accepted and approved by the trial judge; and on that issue the case was tried.

It is clear that none of these issues also arose upon or was controlling as to the counterclaims, the principal issues in those claims being (1) whether the landlord and the added counterclaim defendants had been engaged in the conspiracy in violation of the antitrust laws shown in *United States* v. *Paramount*, and (2) whether by reason of that conspiracy excessive terms, conditions and charges for pictures had been imposed on petitioners.

The district court made at least four important decisions in this case preceding the judgment, all of which applied the elementary distinction between the legality of the franchise standing alone and as part or a result of conspiracy, and all of which are in conflict with the dismissal of the counterclaims.

Those decisions were:

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1. The decision striking from petitioners' answer in the eviction suit the defense that the landlord was engaged in the conspiracy in the *Paramount* case, and was attempting to evict the theatre tenant in pursuance of that conspiracy. The ground of this decision was that, as to the right of the landlord to recover possession of the theatre, the conspiracy was immaterial, and to urge it was an improper collateral attack on that right; in a word, that the issue in the eviction suit was not conspiracy and was not affected by the conspiracy.

2. The decision sustaining the counterclaims as well pleaded and valid.

3. The decision separating the two cases for trial, and the actual separate trial of the eviction suit.

4. The decisions limiting the evidentiary effect of the judgments in the *Paramount* case, when introduced by the landlord in the eviction case, to the fact that they contained a prohibition of franchises, and refusing to treat them as evidence of the conspiracy on which they were based and which they enjoined, or as evidence that Paramount was a participant in that conspiracy.

In effect, the district court has inverted the elementary rule that where there is a conspiracy in restraint of trade, "The plan may make the parts unlawful" (*Swift & Co.* v. *United States*, 196 U. S. 375, 396), and has decided that where one part is lawful standing alone, the plan is lawful. This distinction between the legal character of the parts separately and collectively, although specifically pointed out by this Court as applicable in *United States* v. *Paramount*, 334 U. S. 131, was disregarded by the district court. This Court said:

> For here too the licenses are but a part of the general plan to suppress competition. The case where a distributor fixes admission prices to be charged by a single independent exhibitor, no other licensees or exhibitors being in contemplation, seems to be wholly academic. * * * (334 U. S. 144)

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It is elementary that judgments relative to the legality under the antitrust laws of acts and contracts standing alone and apart from conspiracy are not conclusive on the issue of the legality of the same acts and contracts in the context of conspiracy contrary to the antitrust laws.

Federal Trade Comm. v. *Motion Picture Advertising Services Co.*, 344 U. S. 392, 397-398.
Federal Trade Comm. v. *Cement Institute*, 333 U. S. 683, 706-709.
United States v. *United Shoe Mach Co.*, 258 U. S. 451.
United States v. *Reading Co.*, 226 U. S. 324.
Union Pacific Case, 226 U. S. 61; 226 U. S. 470.
Swift v. *United States*, 196 U. S. 375.
Aikens v. *Wisconsin*, 195 U. S. 194.

In *Federal Trade Commission* v. *Motion Picture Advertising Services*, 73 S. Ct. 361, a proceeding based on conspiracy, the Commission issued a cease and desist order against exclusive dealing contracts, and in a second proceeding against but one of the parties in the first proceeding sought a similar order against the same exclusive dealing contracts of the single respondent. This Court denied that the first order was conclusive in the second proceeding, saying:

> Finally, respondent urges that the sole issue raised in the Commission's complaint had been adjudicated in a former proceeding instituted by the Commission which resulted in a cease and desist order. 36 FTC 957. But that was a proceeding to put an end to a conspiracy between respondents and other distributors involving the use of these exclusive agreements. The present proceeding charges no conspiracy; it is directed against individual acts of respondents. The plea of res judicata is therefore not available since the issues litigated and determined in the present case are not the same as those in the earlier one * * * (p. 365)

In *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 706-709, this Court held that its decision in 1925

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in the so-called *Old Cement Case,* 268 U. S. 588, denying an injunction under the Sherman Act, was not a bar to the later order of the Trade Commission to cease and desist from similar practices as unfair methods of competition. This Court held that its decision in the *Old Cement Case* that the defendants had not engaged in a conspiracy in violation of the Sherman Act, was not conclusive of the question in the Trade Commission Case whether the defendants were engaged in a combination in restraint of trade which amounted to an unfair method of competition in violation of the Trade Commission Act, although the questions in both cases arose on substantially similar facts.

As to the *Old Cement Case,* this Court said, "We think it has little relevance, if any at all, to the issues in this case." (333 U. S. 706)

> The Court's holding in the Old Cement case would not have been inconsistent with a judgment sustaining the Commission's order here, even had the two cases been before this Court the same day. The issues in the present Commission proceedings are quite different from those in the Old Cement Case, although many of the trade practices shown here were also shown there. (p. 708)
>
> * * * * * * *
>
> In the second place, individual conduct, or concerted conduct, which falls short of being a Sherman Act violation may as a matter of law constitute an "unfair method of competition" prohibited by the Trade Commission Act. A major purpose of that Act, as we have frequently said, was to enable the Commission to restrain practices as "unfair" which, although not yet having grown into Sherman Act dimensions would, most likely do so if left unrestrained. (p. 708)
>
> * * * * * * *
>
> These marked differences between what a court must decide in a Sherman Act proceeding and the duty of the Commission in determining whether conduct is to be classified as an unfair method of competition are enough in and of themselves to make the Old Cement decision wholly inapplicable to our problem in reviewing the findings in this case. (p. 709)

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The difference between the issue of the legality of exclusive dealing contracts when parts of a plan including other monopolistic practices, and the issue as to the legality of the same contracts standing alone, is illustrated in the *Shoe Machinery Cases.* In the first *Shoe Machinery Case,* 247 U. S. 32, 1918, it was held that acquisitions and marketing practices of the Shoe Machinery Corporation, which included leases of its machines containing the condition that the lessees should use its machines exclusively, did not constitute violation of the Sherman Act. In the second case (258 U. S. 451, 1922), it was held that the same restrictive leases did violate the kindred Clayton Act. The judgment in the first case as to the legality of the collective activities was therefore held not conclusive in the second case as to the legality of one of those activities. The District Court made the following statement in the second case, which was affirmed by this Court:

> To obtain the relief in that case the complaint charged that the defendants, by combinations with other shoe machinery manufacturers and the acquisition of the business of competitors, had obtained a monopoly of the foreign trade and commerce in shoe machinery, in restraint of trade, in violation of the Sherman Act, and that they had succeeded in that object. Among the numerous alleged unlawful acts charged, which made it possible for them to achieve that object was the insertion of these tying clauses in the leases. But this was only one of the acts charged to accomplish the result complained of. This allegation was therefore collateral to the main issue, and could only have been incidentally considered by the court. In this action no attack is made on any of the acts complained of, and which were the basis of the former suit, except the tying clauses. Nor is the object of the suit the same. (264 F. 138, 156, 1920.)

In *United States* v. *Reading Company,* 226 U. S. 324, 1912, three railroad companies who owned, mined and shipped about 75 percent of the anthracite coal, made con-

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tracts with the independent collieries along their lines requiring the sale to the railroads of their entire product at 65 percent of the tidewater price. It was argued that the contracts were not violative of the antitrust laws, because (1) they "are not, in themselves, unlawful and unreasonable restraints of interstate trade and commerce", (2) they "are perfectly honest, straightforward, and legitimate sales of coal", and (3) are "bona fide transactions for the sale of the product of the particular collieries involved, untainted by any ulterior or illegal purpose or design." (ibid., pp. 331-332)

The Court said :

> It is obvious that the averments do not touch upon the legality of the contracts considered severally, and ask no relief upon the theory that each was a contract in restraint of trade. The theory and charge of the bill is that by concerted action between the defendants the independent operators were to be induced to enter singly into uniform agreements for the sale of the entire output of their several mines and any other they might thereafter acquire, excluding a negligible amount of unmarketable coal and coal for local consumption. And the further theory of the pleading is that by such concerted action and through the higher price offered, the defendants would obtain such control of independent coal as to prevent competition in the markets of other States.
>
> It is not essential that these contracts considered singly be unlawful as in restraint of trade. So considered, they may be wholly innocent. Even acts absolutely lawful may be steps in a criminal plot. *Aikens* v. *Wisconsin*, 195 U. S. 194, 206. But a series of such contracts, if the result of a concerted plan or plot between the defendants to thereby secure control of the sale of the independent coal in the markets of other States, and thereby suppress competition in prices between their own output and that of the independent operators, would come plainly within the terms of the statute, and as parts of the scheme or plot would be unlawful. (ibid., pp. 357-358)

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In the *Southern Pacific Case,* 259 U. S. 214, this Court held, in effect, that a previous judgment in the *Union Pacific Case,* 226 U. S. 61; 226 U. S. 470, that the combination of the Union Pacific and the Southern Pacific railroads was a violation of the antitrust laws was not also a judgment as to the legality under the antitrust laws of a combination of the Southern Pacific and the Central Pacific Railway Company. In the *Union Pacific Case,* the government, in a suit filed February 1, 1908, procured a judgment for separation of the Union Pacific and the Southern Pacific, both of which traversed the country west of the Mississippi to the Pacific Coast, as in violation of the antitrust laws. In the *Southern Pacific Case,* filed February 11, 1914, the government sought to require the Southern Pacific to divest itself of stock control of the Central Pacific, a line serving the area between Ogden and San Francisco, a control held before and at the time of the judgment in the *Union Pacific case.* The contention that the judgment in the *Union Pacific case* was an adjudication against the government in favor of the legality of the combination of the Southern Pacific and Central Pacific, was overruled.

> The conclusive answer to this contention is that the Central Pacific was not a party to that suit up to the final decree in this court. That suit and the present one do not relate to the same subject matter. The issues and questions, therein decided, are not the ones presented for decision here. (259 U. S. 240)

In *Swift* v. *United States,* 195 U. S. 375, 1905, competitive meat packers acted in concert on buying and selling prices, raising and lowering prices, placing restrictions on shipments of meat, making charges for cartage, etc. It was argued that these acts were lawful because they were the individual acts of the defendants relative to their own property, in private sales by themselves; hence the charge was of a conspiracy "to do a lawful act, the exercise of a constitutional right, viz: to raise, lower, fix and maintain their own prices, for their own property, in private sales

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thereof by themselves", and "the lawful act of fixing their own charges for cartage." (ibid., p. 382-383)

This Court said:

> The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. * * * The unity of the plan embraces all the parts. (ibid., p. 396)

The Court of Appeals and the District Court Have Approved as Lawful the Very Same Restraints of Trade Disapproved as Unlawful by This Court in the Paramount Case.

Despite the fact that the district court made general conclusions in its findings and opinion that no conspiracy existed, it made specific findings the correct effect of which is to the contrary (supra, pp. 13-14). (R. 79-90, Q. 101-106)

The findings and opinion show that in the Los Angeles area the major picture distributing companies are continuing to practice the same conspiracy and monopoly system of runs and clearances and allocation of pictures among the exhibitors, the same vertical combination control by the major picture distributing companies of the first run theatres, the same preferential licensing of first run pictures to the vertical combination theatres and the same discrimination against independents, which were found by the district court and this Court in the *Paramount case* to exist on a nationwide scale, including Los Angeles, and to be the result of conspiracy and therefore unlawful.

The district court said that a "code of conduct", a "scheme of distribution", a "course of action", and a "plan", had been "accepted and adopted" and "built up", by all of the major distributing companies, and was then in effect, for allocating the runs and clearances, and

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fixing minimum admission prices, etc., for theatres in the entire Los Angeles area. (R. 79-82, 101-103). It found that this system of runs and clearances was "a matter of necessity" because "some adequate scheme of distribution must be developed". (R. 80, 102)

These findings are substantially the same as those of the district court in *United States* v. *Paramount,* 70 F. Supp. 53, 1947, fully affirmed by this Court, 334 U.S. 131. On the same subject, the district court in its opinion in that case after the mandate of this Court, said:

> But here we are presented with a conspiracy among the defendants to fix prices, runs and clearances which we have already pointed out was powerfully aided by the system of vertical integration of each of the five major defendants. Such a situation has made the vertical integrations active aids to the conspiracy and has rendered them in this particular case illegal, however innocent they might be in other situations. . . . Here, the vertical integrations were a definite means of carrying out the restraints and conspiracies we have described. Moreover, we concluded in our prior findings, and the Supreme Court has affirmed our conclusion, that the distribution practices of the defendants constituted an attempt to obtain a monopoly in exhibition forbidden by the Sherman Act, . . .
>
> In respect to monopoly power, we think it existed in this case. As we have shown, the defendants were all working together. There was a horizontal conspiracy as to price-fixing, runs and clearancse. The vertical integrations aided such a conspiracy at every point.
>
> • • • • • • • • • •
>
> If an intent to exercise the power be thought important, it existed in this case, as we noted above in finding an attempt to monopolize. (*United States* v. *Paramount,* 85 F. Supp. 893-894.)

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CONCLUSION

The judgment should be reversed and the counterclaims of the petitioners allowed to proceed to trial.

Respectfully submitted,

RUSSELL HARDY
HENRY SCHAEFER, JR.,
JAMES WALLACE KEMP,
Attorneys for petitioners.

September 1953

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IN THE

Supreme Court of the United States

October Term, 1952
No. 641.

PARTMAR CORPORATION and FANCHON & MARCO, INC.,
Petitioners,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION, *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION.

Respondents respectfully submit that the petition of Partmar Corporation and Fanchon & Marco, Inc., for Writ of Certiorari should be denied. Said petition presents no question properly calling for the exercise of this Honorable Court's discretion, and the decisions of the courts below were clearly correct.

QUESTIONS PRESENTED.

1. Whether a finding made by the District Court that the theatre lease and film franchise under which petitioners operated a first run motion picture theatre neither "constituted any part of, nor were they or any of them entered into as a result of any agreement, combination or conspiracy of any kind whatsoever between Paramount and any other

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person or persons," which said finding was made as part of a decision and judgment denying restitution of said theatre to respondent, Paramount Pictures Theatres Corporation and declaring said lease and franchise "valid subsisting agreement(s) in full force and effect," is *res judicata* against petitioners and precludes recovery on their counterclaims seeking damages for the alleged imposition of the requirements of said franchise and lease upon Partmar as a part of a conspiracy in restraint of trade.

2. Whether petitioners are estopped to claim that the terms of said lease and franchise were part of a conspiracy by their having successfully asserted in defense of respondent's suit that they were not.

3. Whether petitioner's counterclaims were properly dismissed after notice and upon hearing settling findings, conclusions and judgment embodying such dismissal since there could be no genuine issue as to the material fact of a connection between the conspiracy alleged and the terms of said franchise and lease, the lack of such connection being *res judicata.*

4. Whether the dismissal of said counterclaims could in any event affect the substantial rights of petitioners (28 U. S. C. A., Sec. 2111), in view of their inability to recover if permitted to go to trial thereon.

The above are the only questions properly involved in a review of the decision of the courts below. As will hereinafter appear, the other questions attempted to be raised by petitioners would be appropriate in an appeal from the judgment denying respondents restitution of possession of the theatre and adjudicating the validity of the lease and franchise but have no place in the consideration of the limited appeal taken by petitioners.

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STATEMENT OF THE CASE.

Petitioners have successfully defended an action for unlawful detainer and declaratory relief brought by respondents and have obtained a final judgment declaring their right to continue in occupancy of a theatre leased from one respondent and to performance of a film franchise agreement with another respondent [Tr. 110, Par. III, 1, 2] on the ground *urged by petitioners* that said lease and franchise constituted no part of and were not entered into as a result of any agreement, combination or conspiracy of any kind whatsoever between said respondents and any other person or persons. While enjoying the benefits of these adjudications these same petitioners seek by their counterclaims to recover damages from respondents on the ground that alleged excessive terms of said franchise and lease were imposed pursuant to and were part of a conspiracy between respondents and other motion picture producers, distributors and exhibitors. Both the District Court and the Court of Appeal have held that petitioners cannot do so. The correctness of this determination is the only substantive question that has ever been involved in the review of the judgment.

Respondents do not believe that the "Statement" contained in the petition correctly states the facts. Accordingly, the following statement of the facts is submitted.

The complaint contains five causes of action. The first two, in unlawful detainer, seek restitution of possession of a theatre leased by respondent, Paramount Pictures Theatres Corporation, to petitioner Partmar. The third seeks recovery of the balance due on a note which was to mature upon termination of the lease between these parties. The fourth seeks enforcement of a guarantee of performance of the obligations of the lease by

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petitioner Fanchon & Marco, Inc. The fifth is a cause of action for declaratory relief. It seeks an adjudication of a controversy between the parties as to whether the lease was lawfully *terminated by reason of termination of the franchise* [Tr. 3-26, 24].

As stated in the complaint and as found by the District Court [Tr. 3-11, 101] the theatre which was the subject of the lease was, when the lease was executed, owned by respondent Paramount Pictures, Inc., which was then engaged in producing, distributing and exhibiting motion pictures. Said theatre was owned and had been operated for the exclusive purpose and object of having a high-class motion picture theatre centrally located in the City of Los Angeles, to be used for the first run "showcase" exhibition of all motion pictures produced by it. Said respondent concurrently leased the theatre and granted a franchise for the exhibition of Paramount pictures first run to petitioner Partmar, an independent exhibitor unaffiliated with any distributor of motion pictures [Tr. 101]. If any unlawful restraints had in fact been imposed by said lease and franchise, petitioners were the ones who would have benefited thereby. Petitioner Partmar was by said franchise granted the first run exhibition of all the product of respondent Paramount Pictures, Inc., in the Los Angeles area [Tr. 104, 247] and was given clearance over all other exhibitors [Tr. 103, 270]. This relationship commenced in 1933 and was by a series of similar contracts continued into 1952 [Tr. 37].

The importance of such a "showcase" theatre to the distributor was fully set forth in the complaint [Tr. 6-8]. To insure that the theatre would be available as a "showcase" for the product of respondent Paramount Pictures,

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Inc., it was provided in the franchise that said franchise was terminable upon termination of the lease [Tr. 289], and provided in the lease that said lease should be terminable in the event of termination of the franchise [Tr. 211-212]. The complaint alleged the termination of the franchise [Tr. 17] and the consequent termination of the lease [Tr. 17-18].

Petitioners answered the complaint and filed counterclaims. In the first, second and fourth counterclaims which are the subject of this petition, petitioners alleged the existence of the conspiracy which was the subject of the judgment in *United States v. Paramount Pictures, Inc.*, and alleged that excessive terms were imposed in both the film franchise and the theatre lease pursuant to said conspiracy [Tr. 36-42]. No facts supporting recovery on any other basis were alleged.

By order dated April 26, 1948, the District Court ordered separate trial of the first, second and fifth causes of action to be followed by a subsequent trial of other elements of the case, including petitioners' counterclaim [Tr. 44-45]. The trial which was conducted, commencing November 8, 1950, was therefore a trial of the first, second and fifth causes of action of the complaint.

The issues at this trial were: (1) Did the injunction in *United States of America v. Paramount Pictures, Inc.*, enjoin further performance of the franchise thus bringing into effect the condition contained in the lease ending the tenancy in the event of such termination? (2) Was such franchise agreement, *regardless of whether its performance was enjoined* by the decree in *United States of America v. Paramount Pictures, Inc.*, illegal and void and therefore terminated in law, thus giving rise to the right to terminate the tenancy asserted by respondents or thus

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rendering the lease likewise illegal and void as part of an inseverable contract.

The result of the trial was a judgment for petitioners on the first and second causes of action [Tr. 109-111], and a declaration of the rights and duties of the parties on the fifth cause of action.

Paragraph I of the judgment adjudged and decreed that respondent Paramount Pictures Theatres Corporation take nothing by the first and second causes of action (unlawful detainer) of the complaint, and consequently that petitioner Partmar Corporation remain in possession of the theatre [Tr. 110].

Paragraph III of the judgment adjudged and decreed that the rights and duties of the parties be declared as follows:

> (a) The franchise agreement between respondent Paramount Pictures, Inc., and petitioner Partmar Corporation "is a valid and subsisting agreement in full force and effect" [Tr. 110], and
>
> (b) That the lease between respondent Paramount Pictures Theatres Corporation and petitioner Partmar Corporation "is a valid and subsisting agreement in full force and effect" [Tr. 110-111].

Paragraph II of the judgment dismissed petitioner's counterclaims [Tr. 110].

Essential to the judgment sustaining the validity of the franchise agreement and of the lease was the conclusion that each of the said agreements "is in all respects legal" [Tr. 106-107]. The court had found [Tr. 96-97] that, although two documents were executed, the franchise and lease constituted in fact one inseverable agreement. The illegality, therefore, of the franchise portion thereof would

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have compelled the conclusion that the lease was illegal and that petitioner Partmar was in possession without right. In any event the court could not as it did [Tr. 110] decree the rights and duties of the parties as including continued performance of the lease and franchise "in full force and effect," without finding them in all respects lawful.

Respondents had demonstrated to the court in the course of the trial several respects in which the provisions of the franchise agreement would if entered into as a part of, or as a result of a conspiracy or any agreement with anyone other than petitioners alone, constitute violation of the antitrust laws. The District Court therefore could only have concluded that said franchise, and consequently said lease were valid by determining that said agreements were not made in conjunction with any other person than petitioners, and were not a result of any combination or conspiracy of any kind whatsoever. Petitioners urged just this in defense of respondents' claims [Tr. 47, 52, 56-57, 58]. In response to this urging the District Court made the following finding [Tr. 103-104]:

> "20. Paramount, not in conjunction with any other major studio, entered into the franchise agreement which gave to Partmar the right to exhibit the first run features of Paramount in the City of Los Angeles. Neither said franchise agreement, nor said lease, nor any amendment to either of them constituted any part of, nor were they nor any of them entered into as a result of any agreement, combination or conspiracy of any kind whatsoever between Paramount and any other person or persons, nor between Partmar and any other person or persons."

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The District Court did not thereby find as intimated by petitioners (Pet. 26) that the conspiracy which was the subject of the judgment in *United States v. Paramount Pictures, Inc.*, did not exist, only that the particular agreements between petitioner Partmar and respondents were not a part of or affected by it, or any other conspiracy.

The District Court recognized of course, that this finding was fatal to petitioners' counterclaims, since they were based solely on the contention that said conspiracy had been implemented by the lease and franchise. This conclusion was stated in the written Memorandum Of Opinion [Tr. 94]. In this Opinion and by an appropriate conclusion of law [Tr. 107, Concl. 11] it is indicated that the above quoted finding precludes petitioners from asserting that there was a connection between the conspiracy alleged in the counterclaims and these contracts, and that therefore it would not be necessary to take evidence on such counterclaims.

Subsequent to the filing of this Opinion both parties submitted proposed findings of fact and conclusions of law. Those submitted by petitioners did not embody a conclusion that the counterclaims should be dismissed. Those proposed by respondents, which were with minor revisions accepted by the court, fully stated the conclusion that the counterclaims should not proceed to trial [Tr. 107-108] and the findings of fact which supported this conclusion. The matter of settling the findings, conclusion and judgment came on for hearing before the District Court on June 18, 1951. Counsel for petitioners appeared and vigorously resisted the adoption of the findings and conclusions proposed by respondents and accepted by the court and the judgment dismissing the counterclaims [Tr. 143-147]. At the conclusion of this hearing

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the court announced its acceptance of the findings, conclusions and judgments submitted by respondents and made its order accordingly.

Petitioners appealed from the portion of the judgment of the court dismissing the counterclaims and from no other part of said judgment [Tr. 111]. Though petitioners clearly had a right to a broader appeal, *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U. S. 241 (1939), they understandably did not wish to risk, by testing the legality of their bases, the substantial benefits which the other portions of the judgment afforded them. Consequently, the sole question involved in their appeal was whether petitioners' first, second and fourth counterclaims were properly dismissed, and if they were not properly dismissed, whether any substantial rights of petitioners had thus been affected. Errors specified by petitioners allegedly committed in the trial of the first, second and fifth causes of action (Pet. 2-3, Questions 5, 6, 7 and 10) are beyond the reach of any court since the judgment in said respects has become final and the rights of petitioners to the benefits of such judgment regardless of its correctness conclusively established. Any discussion of the merits of petitioners' appeal must therefore deal with the question of the effect of the final judgment on the first, second and fifth causes of action upon the right of petitioners to maintain their first, second and fourth counterclaims.

The Court of Appeals unanimously agreed with the District Court that petitioners could not accept the benefits of the judgment on the first, second and fifth causes of action without being bound by the findings upon which it was based, and affirmed without further statement of reasons [Tr. 432].

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ARGUMENT.

I.

The Petition Seeks Only to Have This Court Correct Alleged Error in Two Lower Courts. There Is No Important Question of Federal Law Involved.

The petition is devoted almost entirely to an attempt to show that the decisions below were erroneous. Such a demonstration, even if successful, would not call for granting the petition.[1]

A consideration of the facts as hereinbefore correctly stated makes it abundantly clear that no questions of general importance are involved. Petitioners' counterclaims have been dismissed because they are precluded from proving a fact essential to their recovery by the judgment on respondents' first, second and fifth causes of action, on principles of *res judicata* and estoppel. Whether this determination be correct or erroneous, and respondents confidently assert it is correct, it manifestly is of no direct concern to anyone other than the petitioners. No one other than the parties to the judgment can possibly have it thus used against them, and no one other than petitioners could possibly have a claim based upon the alleged excessive terms of the contracts which the finding of the District Court holds were entirely disconnected from any conspiracy.

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[1]Supreme Court Rules, Rule 38, 5. Chief Justice Vinson, referring to a petition for certiorari, stated, "If it only succeeds in demonstrating that the decision below may be erroneous, it has not fulfilled its purpose." Speech before Amer. Bar Assn., Sept. 7, 1949.

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Petitioners attempt to show (Pet. 26-31) that the District Court held that "no conspiracy existed," in the Los Angeles area, and quote remarks in the Memorandum Opinion of the District Court out of context to prove this. The claimed effect of this alleged holding is to preclude others seeking to recover treble damages for injuries to their business as a result of alleged restraints imposed upon them by runs or clearances which they may contend grew out of conspiratorial arrangements effective in this same area. Aside from the obvious fact that these other claimants could in no wise be bound by any such holding it is apparent that the District Court's decision legitimately cannot be so construed in any event.

The decision of the District Court is found in the Memorandum Opinion read as an entirety and considered together with the findings, conclusions and the judgment [Tr. 70-111]. Considered in this context the remarks of the District Court emphasized by petitioners constitute no more than an expression of the view that since the prior run and the clearance afforded petitioners were not part of any conspiratorial arrangement, they were legitimate. The remarks quoted thus properly construed were merely a justification of these terms of the franchise, entered into, as the Court held, independently of any conspiracy.

There is, therefore, no basis for petitioners' assertion (Pet. 28) that the District Court has by inference nullified the authority of the decision of this Honorable Court in *United States v. Paramount Pictures, Inc.* The District Court did not pass on the question of whether the conspiracy described in *United States v. Paramount Pictures, Inc.,* existed in Los Angeles; it held only in re-

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sponse to petitioners urging that the contracts between petitioners and respondents were not part of or influenced by such conspiracy or any other conspiracy.[2]

II.

Decisions in District Court and Court of Appeals Are Clearly Correct.

Petitioners have vigorously assailed the correctness of the decisions of the District Court and the Court of Appeals as erroneous in several respects. None of the specifications of error are well taken.

A. The Finding of No Connection Between Any Conspiracy and Lease-franchise Is Res Judicata and Precludes Recovery Upon Counterclaims.

The District Court held that the lease and franchise were each a "valid and subsisting agreement in full force and effect" [Tr. 110, 111] because said Court had found that said agreements were in no way affected by or connected with any conspiracy between any persons whatsoever. It did not hold as claimed by petitioners (Pet. 24) that the "franchise was lawful standing alone" which is merely to say that considered apart from the question of conspiracy, it *would be* lawful. Rather it held the lease-franchise *was* lawful *because* it was not part of a conspiracy.

---

[2]It is apparent that the Court reasonably so found, in view of the fact that by the franchise and lease petitioner Partmar, an independent exhibitor [Tr. 101], was admitted to, rather than excluded from, the first run exhibition of motion pictures in this area, and given the advantages of run and clearance commensurate therewith.

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The issue of the *connection* between any conspiracy and the lease-franchise was and is an issue common to both the first, second and fifth causes of action of the complaint and the first, second and fourth counterclaims.

The larger issue of the legality of the lease and franchise was properly raised by the pleadings on the first, second and fifth causes of action [Tr. 3-26, 8, 9, 13].

> *South Side Theatres v. United West Coast Theatres Corporation,* 178 F. 2d 648 (9th Cir., 1949).

Moreover, this issue was tendered in arguments on motions for summary judgment one and one-half years prior to the trial [Tr. 113-114] and by respondents' opening statement [Tr. 119-120]. Counsel for petitioners was advised by the Trial Court early in the trial of the first, second and fifth causes of action that it was essential to their defense that the lease and franchise be found to be legal [Tr. 142]. The question of their legality was therefore clearly a matter which was in issue[3] and which was

---

[3]The introduction of this issue of the illegality of the lease and franchise did not, as claimed by petitioners (Pet. 22), involve enforcement of rights growing out of an illegal contract. The District Court held [Tr. 96-97] that the lease and franchise though separate documents, constitute a single inseverable agreement. If, therefore, the terms of the Franchise were illegal, the entire franchise-lease agreement was null and void. The owner of real property being occupied by a purported lessee pursuant to an illegal agreement is entitled to recover possession, and the process of affording such restitution is not enforcement of any rights growing out of the contract, but rather a recognition of the fact that the defendant has no rights by virtue of the contract which, so long as it is executory, can be repudiated. (*Glos v. McBride,* 47 Cal. App. 688, 690-691 (1920); *Green v. Frahm,* 176 Cal. 259

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adjudicated [Tr. 110-111]. The issue of the connection between any conspiracy and the lease-franchise agreement was, of course, as found by the Court [Tr. 103-104, 106], necessarily involved in the determination of this larger issue of the legality thereof.

Likewise, the issue of the *connection* between any conspiracy and the lease-franchise is necessarily raised by the petitioners' first, second and fourth causes of action. As stated (Pet. 25) the counterclaims are "based on the fact that they (petitioner Partmar) licensed the pictures and leased the theatre, that the *picture and theatre rentals* were affected by the conspiracy in restraint of trade." The picture and theatre rentals are terms of the franchise and lease. If said franchise and lease were neither the result of nor affected by any conspiracy, it is manifest that the same must be true of the picture and theatre rentals which were but terms of such franchise and lease.

(1917); *McKinney v. Andrews,* 41 Tex. Reports 363 (1874); *Hall v. Corcoran,* 107 Mass. 251, 256-257 (1871).

Of course, petitioners' claims in this respect relate only to whether the judgment on the first, second and fifth causes of action was placed upon an erroneous basis. This is a matter which can only properly be looked into in an appeal from said judgment on said first, second and fifth causes of action. The fact remains that whether or not the legality of the lease and franchise should have been determinative of petitioners' right to remain in possession, the Court would not have allowed them to remain in possession had it not found said lease and franchise were legal. Now that the judgment protecting their possession has become final, petitioners must accept it for what it is, a judgment that they were entitled to remain in possession and to continued performance of the lease and franchise because, and only because, said franchise and lease were legal in all respects.

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It is, of course, well settled that a judgment is conclusive, as to all facts which are in issue and which are adjudicated, against any party to the action in any subsequent proceedings whether on the same or different cause of action.

50 C. J. S. 168;

Lineker v. Marshall, 7 F. 2d 875, 878 (9th Cir., 1925).

The additional parties defendant to the counterclaims do not affect the conclusiveness of the findings as against petitioners who were all parties to the first, second and fifth causes of action.

Bernhard v. Bank of America, 19 Cal. 2d 807 (1942);

Hurley v. Southern California Edison Company, 183 F. 2d 125 (9th Cir., 1950);

Bruszewski v. United States, 181 F. 2d 419 (3rd Cir., 1950).

Aside from the applicability of the doctrine of *res judicata,* it is manifest also that petitioners are now estopped to assert that the provisions of the lease and franchise are part and parcel of the conspiracy alleged in their counterclaims, since they have successfully urged the exact contrary [Tr. 52, 56-57, 58], in the District Court, in defense of the first, second and fifth causes of action.

31 C. J. S. 381;

Chandler v. McKerral, 68 F. 2d 343 (7th Cir., 1934).

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B. No Genuine Issue Remained as to a Material Fact; Dismissal of Counterclaim Was Proper.

Since the issue of connection between any conspiracy and the terms of the lease and franchise essential to recovery on the counterclaims was *res judicata* against petitioners, it is apparent that there was no genuine issue as to this material fact. A summary dismissal of the counterclaims, therefore, was appropriate. (F. R. C. P., Rule 56(c).) Petitioners were afforded the substance of a hearing upon motion for summary judgment by the hearing to settle the findings, conclusions and judgment of which they were notified and at which they appeared and opposed the adoption thereof. Petitioners were duly advised by the opinion of the Court and by the submission of respondents' proposed findings of fact, conclusion and judgment [Tr. 94, 107-108] that the issue of summary disposition of their counterclaims was before the Court. The absence of a formal motion for summary judgment did not limit the Court's power in this respect.

> *Northland Greyhound Lines, Inc. v. Amalgamated Association, etc.*, 66 F. Supp. 431 (D. C. Minn., 1946);
>
> *Hooker v. New York Life Ins. Co.*, 66 F. Supp. 313 (N. D. Ill., 1946); rev. on other grounds, 161 F. 2d 852.

In any event, it is apparent that since the issue of connection between any conspiracy and the franchise and lease is *res judicata* against petitioners, they would never be able to recover on their counterclaims if they were

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permitted to go to trial thereon. Such being the case, any errors or defects concerning the procedure by which their counterclaims were dismissed could not effect the substantial rights of petitioners, and consequently, are not ground for reversal of the District Court judgment. (Title 28, U. S. C. A., Sec. 2111.)

CONCLUSION.

For the reasons hereinbefore stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1953

No. [redacted]17

PARTMAR CORPORATION and FANCHON & MARCO, INC.,
Petitioners,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION, *et al.*,
Respondents.

BRIEF OF RESPONDENTS.

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IN THE

Supreme Court of the United States

October Term, 1953

No. 641.

PARTMAR CORPORATION and FANCHON & MARCO, INC.,
Petitioners,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION, *et al.*,
Respondents.

BRIEF OF RESPONDENTS.

Questions Presented.

1. Whether petitioners are precluded and estopped from claiming that the terms of the theatre lease and film franchise, both granted by respondent Paramount, under which petitioner Partmar operated a first run motion picture theatre owned by respondent Paramount, were part of or resulted from a conspiracy in violation of the Antitrust Laws, petitioners having successfully asserted in defense of respondents' action to recover possession of said theatre and for declaratory relief that said lease and franchise were not a part of nor the result of any such conspiracy.

2. Whether a finding made in this action by the District Court that the theatre lease and film franchise under which petitioners operated said first-run motion

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picture theatre neither "constituted any part of, nor were they or any of them entered into as a result of any agreement, combination or conpiracy of any kind whatsoever between Paramount or any other person or persons," which said finding was made part of a decision and judgment denying restitution of said theatre to respondent Paramount, and declaring said lease and franchise "valid, subsisting agreement(s) in full force and effect," is *res judicata* against petitioners in their Counterclaims seeking damages for the alleged imposition of the requirements of said franchise and lease upon Partmar as a part of an alleged conspiracy in restraint of trade.

3. Whether petitioner's Counterclaims were properly dismissed after notice and upon a hearing settling findings, conclusions and judgment embodying such dismissal, there being, by virtue of said preclusion and estoppel and said *res judicata*, no genuine issue as to any connection between the conspiracy alleged and the terms of said franchise and lease, a fact material to recovery upon the Counterclaims.

4. Whether the dismissal of said Counterclaims could in any event affect the substantial rights of petitioners (28 U. S. C. A., Sec. 2111), in view of their inability to prove said material fact by reason of said preclusion and estoppel and said *res judicata*.

Petitioners have attempted to raise other questions. As hereinafter demonstrated, these questions have no proper place in the review of the judgments below in view of the limited appeal taken by petitioner and the limited review allowed by the Court in its order granting certiorari. Moreover, none of these contentions of petitioners are valid.

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Statement.

The "Statement" of petitioners (Pet. Br. 2-14) does not fully and correctly state the facts. Accordingly, the following full statement of the facts is submitted by respondents.

The Court of Appeals for the 9th Circuit affirmed the judgment of the District Court which dismissed petitioners' First, Second and Fourth Counterclaims. These Counterclaims sought damages from respondents on the ground that alleged excessive terms of a lease and franchise under which petitioners operated the theatre owned by respondent Paramount[1] and licensed the first run exhibition of films of said respondent were imposed pursuant to and were part of a conspiracy in restraint of trade between respondents and the other motion picture producers, distributors and exhibitors who were parties defendant in *United States v. Paramount Pictures, Inc.*

The main action to which petitioners interposed these Counterclaims was an action brought by respondent Paramount for unlawful detainer to evict petitioners from the theatre and to declare whether the lease and franchise were valid and subsisting agreements. In defense of these claims, petitioners urged *successfully* that the lease and franchise were valid and subsisting agreements *because* they constituted no part of and were not entered into as a result of any agreement, combination or conspiracy of

---

[1]Respondents Paramount Pictures Theatres Corporation and Paramount Pictures, Inc. are referred to herein as "respondent Paramount." The District Court did so throughout its findings, conclusions and judgment, pursuant to its conclusion No. 5 [Tr. 106] that they should be considered as one party. Petitioners likewise assert that though these respondents "were different corporations, there was no actual distinction between them" (Pet. Br. 23, fn. 1).

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any kind between respondent Paramount and any other person or persons.

The judgment of the District Court that petitioners were entitled to continue in occupancy of the theatre and that the lease and franchise were valid and subsisting contracts *was not appealed* from by either party and has become *final* as to all parties.

1. Basis of District Court's Dismissal of Counterclaims.

The basis of the District Court's dismissal of the Counterclaims and of the Court of Appeals' affirmance thereof is that on principles of preclusion and estoppel or *res judicata* petitioners are precluded from proving in support of their Counterclaims the exact opposite of what they have successfully contended in defense of respondent's claims. The only issue in the review of these determinations is the correctness of the application of these principles to the established facts, and the propriety of the summary disposition made of petitioners' claims in respect of which there remained no genuine issue as to this material fact.

2. The Complaint in This Action.

The complaint in respondent's action to recover possession of the theatre and for declaratory relief contains five causes of action:

(i) The First and Second Causes of Action seek restitution of possession of the theatre leased by respondent Paramount to petitioner Partmar.

(ii) The Third Cause of Action seeks to recover the balance due on a note payable by petitioner Partmar upon termination of the lease.

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(iii) The Fourth Cause of Action seeks to enforce a guarantee of performance of the obligations of the lease by petitioner Fanchon & Marco, Inc., which owns all the stock of Partmar.

(iv) The Fifth Cause of Action, for declaratory relief, sets forth a controversy between the parties as to whether the lease had been lawfully terminated by reason of termination of the franchise and asks for adjudication of the status of the contractual relationships of the parties. [Tr. 3-26.]

3. The Theatre Lease and Film Franchise.

The Court found that the theatre, which was the subject of the lease, was owned by respondent Paramount at the time the lease was executed, and, prior to said leasing, the theatre had been owned and operated by respondent for the sole purpose of having an outlet in the City of Los Angeles for the first-run exhibition of motion pictures produced by respondent. [Tr. 101.] Respondent Paramount was then engaged in producing, distributing and exhibiting motion pictures. [Tr. 3-11, 101.]

Respondent, concurrently with leasing the theatre, granted a franchise for the exhibition of its first-run pictures to petitioner Partmar, an independent exhibitor unaffiliated with any distributor of motion pictures. [Tr. 96, 101.] The franchise granted petitioner Partmar the first-run exhibition rights to all the product of respondent Paramount in the Los Angeles Area. [Tr. 104, 247.] It likewise gave Partmar clearance over all subsequent exhibitions of said pictures in the Los Angeles area. [Tr. 103, 270.] This contractual relationship commenced in 1933 and by a series of similar contracts, amendments and extensions was so continued that the terminal date

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of the lease and franchise in effect at the time the action was brought was March, 1952. [Tr. 37.]

The mutual advantages of this transaction are apparent. The theatre continued to be available to respondent Paramount as an outlet for its product. The franchise gave petitioners an assured source of first-run pictures to be exhibited in this theatre, with clearance over all subsequent run theatres in the Los Angeles area. Petitioner had no first-run theatre in the Los Angeles area, and the lease and franchise gave petitioners an opportunity to operate this first-run theatre with such assured source of film. It is obvious, therefore, that, as found by the Trial Court, the making of the lease and franchise could have nothing to do with any conspiracy to discriminate against independents found in the New York case of *United States v. Paramount,* since the lease and franchise are inconsistent with any such conspiracy.

To insure the use of the theatre as an outlet for respondent's pictures, it was provided that the franchise was terminable upon termination of the lease, and vice versa. [Tr. 211-212, 289.] The basis of the First and Second Causes of Action was the termination of the franchise and the consequent termination of the lease. [Tr. 17-18.] The controversy between the parties set forth in the Fifth Cause of Action was as to whether the lease had been terminated by reason of the termination of the franchise and the right and duties of the parties under the lease and franchise. [Tr. 24.]

4. The Counterclaims.

Petitioners answered the complaint and filed the Counterclaims, the dismissal of which is the subject of the review in this proceeding. It is only the First, Second

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and Fourth Counterclaims which are involved, since these were the only Counterclaims which were dismissed. [Tr. 110.]

These Counterclaims alleged the existence of a conspiracy which, it was alleged, was the subject of the judgment of the New York court in *United States v. Paramount Pictures, Inc.* It was alleged that the counter-defendants (respondents), pursuant to said conspiracy, imposed excessive terms in both the film franchise and theatre lease. [Tr. 36-42, Pet. 25.] No alleged facts supporting recovery on any other basis were set forth.

5. The Order of Trial.

By its order dated April 26, 1948, the District Court ordered separate trial of the First, Second and Fifth Causes of Action to be followed by a subsequent trial of other elements of the case, including petitioners' Counterclaims. [Tr. 44-45.] The trial which was conducted, commencing November 8, 1950, and ending December 21, 1950, was therefore a trial of the First, Second and Fifth Causes of Action of the complaint.

6. The Issues Actually Tried.

The issues actually tried at this trial were:

1. Did the injunction issued by the New York District Court in *United States of America v. Paramount Pictures, Inc.*, enjoin further performance of this franchise and thus terminate the franchise, bringing into effect the condition ending the term of the lease in the event of such termination or terminating the entire lease-franchise agreement as one inseverable contract?

2. Was the franchise agreement, *regardless of whether its performance was enjoined specifically by the decree*

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of United States of America v. Paramount Pictures, Inc., illegal and void and therefore terminated in law, bringing into effect the condition contained in the lease ending the term thereof in the event of the termination of the franchise, or rendering the lease likewise illegal and void as part of an inseverable contract?

It is with respect to the second of these two issues that the position was taken by petitioners which now precludes and estops them to prove an essential element of their Counterclaims. This issue was not, as urged by petitioners (Pet. 10), restricted to the question whether respondent Paramount had imposed unlawful restraints upon petitioners by the terms, conditions and charges of the franchise and lease. The franchise placed petitioner Partmar in a prior position with respect to run and clearance in the Los Angeles area and the Court considered whether this did not constitute an unlawful restraint upon *other exhibitors*. Before hearing the evidence in this respect the Court indicated there was considerable question in his mind in this regard, saying [Tr. 135]:

> "It seems to me, Mr. Hardy, that if there is a monopoly here Partmar has the monopoly. Partmar has the privileged position here in this community. They are the ones who have the theatres and they are the ones who show the pictures first. Not only that, but according to the theories advanced here, they are precluding the other theatres from showing those pictures until Partmar can show them first. So Partmar has the monopoly."

Evidence bearing upon this aspect of the issue presented was tendered to and received by the Court from witnesses of both parties. Most of this evidence is not

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included in the transcript of record herein. An example of such evidence, however, is in the transcript of record. [Tr. 135-136.] The Court there asked questions of a witness for respondent concerning the existence of any connection between any agreement with any other parties and the run and clearance provisions of the franchise, and was told there was none.

Petitioners' contention therefore (Pet. Br. 9, 18, 24, 25) that the issue of connection between the lease and franchise agreement and any conspiracy was not being considered by the Court is without foundation, as is demonstrated more fully, *infra,* Ch. II, A, p. 23, *et seq.*

This question raised by the Court as to the legality of the competitive advantages afforded to Partmar led petitioners to urge the Court, in its defense against respondent's claim of termination of the lease by virtue of its illegality, that the lease and franchise were legal because said agreements were not the product of agreement between any other persons than petitioners and respondent and were not part of or the result of any combination or conspiracy of any kind whatever. [Tr. 47, 52, 56-57, 58, 65.] Petitioners took this course because the legality of these competitive advantages and of other provisions of the franchise[2] and lease depended upon said agreements being independent of any conspiracy.

7. The Findings and Judgment of the District Court.

The District Court found in accordance with the contentions of petitioners. The result of the trial was a judgment for petitioners on the First and Second Cause

[2]The franchise covered all the product of respondent, Paramount Pictures, Inc. for 10 years [Tr. 247], and required Partmar to exhibit Paramount pictures a minimum of 46 weeks each year [Tr. 251].

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of Action [Tr. 109-111] and a declaration of rights and duties of the parties in accord with petitioners' contentions on the Fifth Cause of Action. [Tr. 110.]

Paragraph I of the Judgment decreed that respondent Paramount take nothing by the First and Second Causes of Action of the complaint, and consequently that petitioner Partmar remain in possession of the theatre. [Tr. 110.]

Paragraph II of the Judgment dismissed the First, Second and Fourth Counterclaims.

Paragraph III of the Judgment declared the rights and duties of the parties as follows:

(a) That the franchise between respondent Paramount and petitioner Partmar "is a valid subsisting agreement in full force and effect". [Tr. 110-111.]

(b) That the lease between respondent Paramount and petitioner Partmar "is a valid subsisting agreement in full force and effect". [Tr. 110-111.]

This judgment not only sustained the validity of the franchise and lease as effective to prevent respondents from repossessing the theatre. It further decreed the rights and duties of the parties as including continued performance of these agreements "in full force and effect." In order to hold that the franchise and lease were thus effective to prevent petitioners from obtaining restitution of the theatre and in order to hold that said agreements were "in full force and effect" the Court found it necessary to and did conclude that each of said agreements:

"is in all respects legal." [Tr. 106-107.]

In support of this conclusion the District Court found that neither of said agreements was entered into as a

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part of or as a result of any agreement, combination or conspiracy. In this respect the Court found [Tr. 103-104]:

> "20. Paramount, not in conjunction with any other major studio, entered into the franchise agreement which gave to Partmar the right to exhibit the first run features of Paramount in the City of Los Angeles. Neither said franchise agreement, nor said lease, nor any amendment to either of them constitute any part of, nor were they or any of them entered into as a result of any agreement, combination or conspiracy of any kind whatsoever between Paramount and any other person or persons, *nor between Partmar and any other person or persons.*"

The District Court made it clear, moreover, that it would not have adjudged petitioners entitled to continued possession of the theatre and to performance of the franchise were it not for this finding. [Tr. 142.]

8. The District Court Did Not Determine Merely That Lease and Franchise Were Legal "Standing Alone"; but Expressly Stated that There Was No Connection Between Them and Any Conspiracy.

As shown under Chapter III, 4, *infra,* p. 54 *et seq.*, the contention of petitioners, repeatedly made throughout their brief (Pet. Br. 11, 12, 15, 19, 24, 26, *et seq.*), that all the Trial Court determined was that the lease and franchise were "not, *standing alone,* violative of the antitrust laws," leaving open the question of whether they were a part of or result of any conspiracy, is totally unsound. The District Court tried the issue of whether the lease and franchise agreement were violative of the antitrust laws, and particularly as to whether they were connected with any conspiracy. The Trial Court made a

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specific finding that they were legal on all grounds and that there was no conspiracy connected with them. This repeated contention of petitioners that the Trial Court merely held the lease and franchise agreement valid "standing alone" and apart from any alleged conspiracy appears to be the keystone to their contentions on this appeal. But mere repetition of a false premise does not add validity thereto.

9. Finding 20 Required Dismissal of Counterclaims Since It Removed an Essential Base for Establishing These Counterclaims.

The District Court recognized of course that this finding precluded recovery upon petitioners' First, Second and Fourth Counterclaims. These Counterclaims were based solely on the contention that the conspiracy in *United States v. Paramount Pictures, Inc.* had been implemented by the lease and franchise and that the terms, conditions and charges contained in said lease and franchise were excessive and were imposed as a part of or as a result of the conspiracy. The District Court filed a Memorandum of Opinion. [Tr. 70-95.] In this Opinion [Tr. 94] and by an appropriate conclusion of law [Tr. 107, Conclusion 11], the District Court held that the above quoted Finding No. 20 (*supra*, p. 11) precluded petitioners from asserting or proving that there was any connection between the conspiracy alleged in the Counterclaims and the terms, conditions and charges embodied in the franchise and lease, and it would therefore be futile to take evidence with respect to such Counterclaims.

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10. Notice, Hearing and Argument Preceded Dismissal of Counterclaims.

Contrary to petitioners' assertions (Pet. Br. 18) that the dismissal of the Counterclaims occurred "without any request therefor from the counterclaim defendants, without any previous notice to or knowledge of petitioners, without any hearing of any kind granted to petitioners . . .," the fact is that prior to entering judgment dismissing the Counterclaims the Court submitted its Opinion stating the conclusion that such dismissal was appropriate. This Opinion directed petitioners to submit proposed findings of fact and conclusions of law. Those submitted by petitioners, however, did *not* embody the conclusion that the Counterclaims should be dismissed, and a set of proposed findings of fact and conclusions of law were submitted by respondents. The findings and conclusions proposed and submitted by respondents fully stated the conclusion that the Counterclaims could not proceed to trial [Tr. 107-108] and the findings of fact which supported this conclusion. Copies of these proposed findings were served upon petitioners and the matter of settling the findings, conclusions and judgment came on for hearing, on notice, before the District Court on June 18, 1951. Petitioners appeared through their counsel and particularly objected to the adoption of the proposed findings and conclusions which embodied the dismissal of the Counterclaims. This matter was argued by counsel for petitioners. [Tr. 143-147.] At the conclusion of and as a result of this hearing the Court adopted and accepted the proposed findings, conclusions and judgment submitted by respondents and made its order accordingly. Included in said judgment was Paragraph II which dismissed petitioners' First, Second and Fourth Counterclaims. [Tr. 110.]

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11. Petitioners Had a Choice Either to Appeal or to Accept Finding 20 That There Is No Connection Between the Alleged Conspiracy and the Lease and Franchise Agreement. They Chose to Accept the Judgment in Their Favor Based Thereon.

At this point petitioners were presented with a choice. They could have appealed from the entire judgment and thus set at large all the findings and conclusions upon which each part thereof depended, or they could have accepted all the consequences of these findings and conclusions.

The judgment declared, pursuant to the Fifth Cause of Action for declaratory relief, that the lease and franchise are valid, subsisting agreements in full force and effect. [Tr. 110-111.] This was not a mere conclusion of law in support of the judgment denying eviction. It was a separate part of the decree based upon the same findings and conclusions as the eviction judgment but applied to a different cause of action. It was favorable to petitioners in so far as it secured to them continued performance of the contracts. However, it was prejudicial to them inasmuch as it precluded recovery upon the Counterclaims.

Petitioners unquestionably had a right to appeal from the declaration that the lease and franchise were valid and subsisting agreements and Finding 20, upon which in part that declaration was based, to the effect that there was no connection between any conspiracy and the lease and franchise agreement. They could, on such appeal have urged that Finding 20 was not supported by the evidence, or was otherwise improper. Of course, had they succeeded in this attack, the inevitable result would have

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been the elimination from the judgment of the declaration that the lease and franchise agreement were valid, subsisting agreements in full force and effect. Neither of these agreements could possibly be valid and subsisting and in full force and effect if they were in fact entered into as a part of or as a result of a conspiracy to restrain or monopolize interstate trade.

As to the portion of the judgment denying restitution of the theatre to respondent Paramount, petitioners were equally able to attack Finding 20. Though the judgment was in this respect favorable to petitioners, Finding 20, upon which it was in part based, was clearly prejudicial because, while it stands, it precludes recovery upon their Counterclaims.

Electrical Fittings Corp v. Thomas & Betts Co. (1939), 307 U. S. 241, is a precise holding that petitioners in this case did have the right to seek elimination of Finding 20 in relation to the denial of restitution of possession of the theatre even if petitioners were correct in their contention that such finding was immaterial to such restitution.[3]

Of course, by thus setting at large the findings and conclusions with respect to the validity of the lease and franchise agreement, petitioners would have risked the substantial benefits which the judgment afforded them. These benefits included immunity from eviction, immunity from substantial damages arising out of petitioners' refusal to surrender possession, continued performance of the lease, and continued performance of the franchise agreement.

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[3]This contention is, however, not correct, as is demonstrated *infra*, pages 50-54. If the lease and franchise agreement were illegal, respondent Paramount, under California law was, as owner of the theatre, entitled to possession.

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If this judgment on the First, Second and Fifth Causes of Action were to become final, petitioners would then be entitled to the benefit of having respondents perform the lease and franchise agreement.

A policy calculated to enable petitioners to retain these benefits while attempting to assail the findings and conclusions upon which they are based recommended itself to them. Petitioners' apparent plan was to seek to avoid the burden of Finding 20 by collaterally attacking the same in their appeal from that part of the judgment which dismissed the Counterclaims.

Pursuant to this policy, petitioners appealed from that part *only* of the judgment of the Court "wherein it is ordered, adjudged and decreed that the first, second and fourth counterclaims of third party plaintiffs Partmar Corporation and Fanchon & Marco, Inc., be, and the same are, each dismissed with prejudice, and the defendants take nothing by reason of said counterclaims". [Tr. 111-112]. Petitioners appealed from no other part of said judgment.

The real question raised by this review is whether such a dubious stratagem shall be permitted to succeed. May petitioners, while continuing to enjoy the benefits of a judgment predicated upon one state of facts urged by them in the proceeding in which such judgment was rendered, be permitted to assert the direct contrary when it would benefit them to do so in connection with their Counterclaims? Stated another way, petitioners take a most unconscionable position. They, in effect, want the benefit of the judgment continuing them in possession of the theatre. They want the benefit of having Paramount perform the franchise as legal. Yet, at the same time,

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they seek to recover treble damages from Paramount on the theory that the lease and franchise are illegal as violative of the antitrust laws.

The Court of Appeals for the 9th Circuit considered the inequity of petitioners' claims so patent that it affirmed by a *per curiam* opinion without further statement of reasons. [Tr. 432.]

12. First, Second and Fifth Causes of Action Were Brought by Respondent Paramount in an Attempt to Comply With the Requirements of Law.

Respondent Paramount felt that it was necessary to bring the First, Second and Fifth Causes of Action to terminate the lease, in view of the pronouncement of the Expediting Court in the 1946 decree adjudicating all franchises to be illegal. The action thus was an attempt to comply with the 1946 decree which appeared to determine, before an appeal was taken to this Court, that all franchises were illegal *per se*. In order to have this matter determined, the preliminary steps were taken, and the action was brought to settle this question. Respondent Paramount sought a declaratory judgment as to the rights and duties of the parties under the circumstances. Before the case came on for trial, this Court rendered its opinion in 1948 remanding the case for further trial and determining that franchises are not illegal *per se*, though franchises may be illegal if they incorporate objectionable features. The qualifications stated in the opinion of this Court regarding the legality of franchises required respondent Paramount to continue with the test of illegality of the Partmar franchise. The purpose of the action was, therefore, to adjudicate whether the franchise violated the standards of the Sherman Act as interpreted by the opinion of this Court. The trial court determined

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that the franchise in question was legal and did not violate the standards of the Act as stated in the opinion of this Court or the Sherman Act generally.

Summary of Argument.

In order to recover upon the First, Second and Fourth Counterclaims, petitioners must prove that the picture and theatre rentals and other terms embodied in the franchise and lease were imposed as part of a conspiracy to restrain or monopolize trade.

Having successfully urged in defense of the First, Second and Fifth Causes of Action that the lease-franchise between petitioner Partmar and respondent Paramount were neither a part of nor entered into as the result of any agreement, combination or conspiracy of any kind, petitioners are now precluded and estopped to assert or prove that the terms, conditions and charges provided therein were imposed as the result of or as part of such a conspiracy. Being thus precluded and estopped to prove this fact of connection between said terms, conditions and charges and any conspiracy, petitioners cannot prove a fact material to recovery upon their Counterclaims.

Petitioners are likewise precluded on principles of *res judicata* from establishing the required connection between the alleged excessive terms, conditions and charges provided by said lease-franchise agreement and any conspiracy. The issue of connection between the lease-franchise agreement and any conspiracy was properly raised, considered and adjudicated in the trial of the First, Second and Fifth Causes of Action.

The conclusiveness of this adjudication in relation to the Counterclaims is not affected by the addition of counter-defendants not parties to the First, Second and Fifth

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Causes of Action because: (1) the defense of *res judicata* is available to any person so long as the party against whom it is asserted was a party to the litigation in which the issue was litigated, and (2) it is impossible for the lease and franchise to be a part of any conspiracy by the third party defendants if it is not a conspiratorial act of respondent Paramount (and it is *res judicata* that it is not such an act of respondent Paramount).

Since petitioners could not possibly prove their Counterclaims if they went to trial thereon, the judgment dismissing such Counterclaims should be affirmed. The material fact of connection between the alleged excessive terms, conditions and charges contained in the lease-franchise agreement is no longer at issue. Summary disposition of the Counterclaims was therefore appropriate. The method by which said Counterclaims were disposed of afforded petitioners the kind of hearing which is appropriate under such circumstances and was therefore proper. Even if this method should be considered questionable, it is apparent that petitioners can have suffered no prejudice by the dismissal of their Counterclaims upon which they can, under no circumstances, recover.

The order of this Court limiting certiorari to a review only of the dismissal of the counterclaims renders it improper for petitioners to argue that other parts of the judgment with regard to runs and clearances constitutes a nullification of the decree of the New York Court in *United States v. Paramount Pictures, Inc., et al.* Moreover, the judgment based on the First, Second and Fifth Causes of Action with respect to runs and clearances has no effect, in fact, to nullify the authority of the New York decree in *United States v. Paramount Pictures, Inc.*

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ARGUMENT.

I.

TO RECOVER UPON FIRST, SECOND AND FOURTH COUNTERCLAIMS, PETITIONERS MUST PROVE THAT TERMS, CONDITIONS AND CHARGES PROVIDED IN THE LEASE AND FRANCHISE AGREEMENT WERE IMPOSED AS A RESULT OF OR AS A PART OF A CONSPIRACY TO RESTRAIN OR MONOPOLIZE INTERSTATE TRADE.

The First, Second and Fourth Counterclaims allege that the counter-defendants engaged in a conspiracy in restraint of trade and commerce among the states in the distribution and exhibition of motion pictures and that this conspiracy was the same conspiracy as that stated in the complaint in *United States of America v. Paramount Pictures, Inc., et al.* [Tr. 36-37.] This conspiracy is then alleged to have been carried out in three different ways to the damage of petitioners.

In the First Counterclaim it is contended that "as part of the aforesaid conspiracy" the counter-defendants "have been able to impose, and they have in fact imposed, upon Partmar Corporation, excessive terms, conditions and charges for the photoplays made and released by them . . ." [Tr. 38-39].

In the Second Counterclaim it is alleged that, pursuant to this conspiracy, respondent Paramount Pictures Theatres Corporation required petitioner Partmar to "pay to it, in addition to the rentals stipulated in the lease, 50%

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of the net receipts of the operation of the theatre." [Tr. 40.]

The Fourth Counterclaim has by oversight been omitted from the transcript of record. The alleged aspect of the conspiracy therein set forth, however, is that "as part of the aforesaid conspiracy, the plaintiff and third-party defendants have required Partmar Corporation to receive and make payment for licenses to exhibit short subject photoplays not desired, needed or exhibited by Partmar at the Paramount Theatre."

The terms, conditions and charges made by respondent Paramount and paid by petitioner Partmar for the photoplays made and released by respondent Paramount are embodied in the franchise. [Pl. Ex. 3; Tr. 246-295.] The provision for the payment of 50% of the net receipts of the operation of the theatre in addition to the rental stipulated in the lease is contained in the amendment to the lease. [Pl. Ex. 2; Tr. 223-244, 226.] The charges for the short subjects are also contained in the franchise agreement. [Pl. Ex. 3; Tr. 264.] Thus the gravamen of the First, Second and Fourth Counterclaims is that the lease and franchise agreement were entered into as a part of or were the result of the conspiracy described, and the terms, conditions and charges therein embodied were imposed as a result of and as part of said conspiracy.

The nature of the Counterclaims is further illustrated by their characterization made in the Petition for Certiorari where, referring to the franchise, it is stated that the

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"restrictions of the contract were in fact parts of such a conspiracy," and "that the picture and theatre rentals were affected by the conspiracy in restraint of trade" (Pet. 25). Similarly, the basis of the Counterclaims is described (Pet. 6) "Paramount . . . had compelled petitioner to pay the excessive theatre rentals and license fees for pictures needed for the theatre."

The Counterclaims make no general complaint that Partmar was damaged by being placed in a position of competitive disadvantage in relation to other exhibitors and allege no damage thus arising. Instead, Partmar alleged that it was required to give excessive consideration for the position of competitive advantage that it enjoyed. Unless, therefore, Partmar can prove that the lease and franchise agreements in which this alleged excessive consideration was provided were a result of or part of the conspiracy alleged, it cannot recover.

Petitioners assert (Pet. Br. 16) that "the particular kind of contract on which petitioners procured pictures, and the particular kind of lease on which they held the theatre, was immaterial to their claim for treble damages." This is, of course, obvious. What petitioners do not explain, however, is how the terms, conditions and charges contained in the lease and franchise agreements can have been a part of or the result of a conspiracy if these agreements themselves were not.

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II.

PETITIONERS ARE NOW PRECLUDED AND ESTOPPED FROM PROVING IN SUPPORT OF COUNTERCLAIMS THAT LEASE AND FRANCHISE ARE PART OR RESULT OF A CONSPIRACY, HAVING SUCCESSFULLY ASSERTED IN DEFENSE OF FIRST, SECOND AND FIFTH CAUSES OF ACTION THAT SAID AGREEMENTS WERE NOT PART OF OR RESULT OF ANY SUCH CONSPIRACY.

Petitioners successfully defended against the First, Second and Fifth Causes of Action on the ground, among others, that the Lease and Franchise were not a part of any conspiracy. They are now precluded and estopped from attempting to show that some parts of the Lease and Franchise were imposed on them as the result of any conspiracy.

A. PETITIONERS HAVE SUCCESSFULLY ASSERTED IN DEFENSE OF FIRST, SECOND AND FIFTH CAUSES OF ACTION THAT LEASE AND FRANCHISE AGREEMENTS WERE NOT PART OF OR THE RESULT OF ANY CONSPIRACY IN RESTRAINT OF INTERSTATE TRADE.

The legality of the lease and franchise was a principal issue in the trial of the First, Second and Fifth Causes of Action. Petitioners prevailed on this issue, and they did so by convincing the Court, which had heard evidence with respect thereto, that the lease and franchise were the result solely of an agreement between petitioner Partmar and respondents. The fact that the legality of the lease and franchise was an issue properly involved in the trial of the First, Second and Fifth Causes of Action, is

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demonstrated *infra,* Chapter III, pp. 44-54. Petitioners were aware not only of the fact that respondents claimed this was a principal issue in the case but early in the trial were likewise advised that the Court considered it an issue in the case and would not deny respondents possession of the theatre without holding that the franchise and lease were lawful agreements. The District Court said [Tr. 142]:

> "But if you are successful in establishing, or if Mr. Chance is successful in establishing that we have a condition here that was an unreasonable restraint of trade, then I think I am going to have to find, as a matter of law, that Paramount was entitled to terminate its lease."

This remark of the Court must be construed in relation to the earlier remark made by the Court quoted herein, *supra,* page 8, to the effect that the provisions of the franchise according Partmar a ten-year license for the first-run exhibition of Paramount pictures and establishing a clearance over all subsequent runs thereof raised a serious question in his mind as to whether Partmar was not thus afforded an unreasonable competitive advantage over other exhibitors. The Court had thus served notice upon petitioner Partmar that he was interested in knowing whether the franchise agreement which afforded Partmar these advantages was merely an agreement between Paramount and Partmar, an independent exhibitor, or was in fact a part of a conspiracy involving other distributors and exhibitors.

The Court itself asked questions of a witness to determine whether the clearance provided by the franchise was the result of an agreement between any persons other than petitioners and respondents. The answers to these

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questions [Tr. 135-136] indicated that in determining the clearance for the theatre operated by petitioner Partmar, Paramount officials acted completely on their own responsibility and without regard to the clearance accorded by other distributors. The Court also asked questions with regard to whether there was any combination or agreement relating to other features of the lease and franchise, receiving answers in the negative. [Tr. 52.]

The Court specifically inquired of counsel for petitioners if he intended to offer any evidence to the contrary and thus invited petitioners to submit such proof. Counsel for petitioners represented that he thought there would be some evidence to that effect. [Tr. 136.] The colloquy of the Court and counsel for petitioners in this regard is as follows:

> "The Court: May I ask, Mr. Hardy, is there going to be any evidence to show that Paramount in conjunction with any other distributor, say Fox-20th Century or Warner Bros., got together and conspired to make these different clearances among the different localities?
>
> Mr. Hardy: I think there will be some evidence to that effect.
>
> The Court: There will be?
>
> Mr. Hardy: Yes, sir.
>
> The Court: All right.
>
> Mr. Hardy: I say I think so. I am not sure. I think we may introduce that.
>
> The Court: Mr. Smith said that there wasn't, so I was just wondering if there was going to be any evidence to the contrary.
>
> * * * * * * * *
>
> The Court: There is nothing in this case so far, as far as I know, to show Paramount got together with any other distributor and attempted to divide

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up the territory or attempted to divide up the theatres, or attempt to divide up the clearances." [Tr. 136-137.]

However, counsel for petitioners never offered any evidence of a conspiracy with regard to the run and clearance or any other features of the lease-franchise agreement.

The Trial Court, moreover, pointed out to counsel both the significance of the legality of the lease and franchise and the significance of the issue of conspiracy in the determination of such legality. At an early stage in the case, the Court said [Tr. 47]:

> "But here, the question is, was this franchise agreement legal or illegal under the Sherman Act?"

During the trial the Court pointed out the significance of the issue of conspiracy with respect to the legality of the run and clearance provisions of the lease-franchise agreement [Tr. 137-8, 143], saying [Tr. 143]:

> "If there is a conspiracy, as I said, if the parties have gotten together, all the producers and all the exhibitors have got together and . . . determined who should have first run, the second run, and so forth, that would be an entirely different situation than we have here at bar."

Instead of offering evidence of conspiracy, counsel for petitioners in their Closing Brief filed with the Trial Court after conclusion of the evidence directly contended that there was no connection between any conspiracy and the lease-franchise agreement. In said Brief, petitioners urged upon the Court:

> "On the evidence in this case the *Partmar franchise* is neither one of a system, or made by one holding a dominant position, or *pursuant to a conspiracy.*" [Tr. 65.]

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Petitioners additionally urged upon the Trial Court at the conclusion of the trial and in their Closing Brief that the first-run privileges accorded Partmar by the lease-franchise agreement were not in violation of the Sherman Act, because said agreement was a *"single"* agreement, necessarily implying that it was unconnected with any conspiracy:

> "No case has held that a *single* exclusive dealing contract applying to as little as 12% of the supply, is violative of the antitrust laws." [Tr. 64.]

Petitioners likewise asserted in their Closing Brief in the trial court:

> "A *single* contract between one film company and one exhibitor, is not violative of the Sherman Act." [Tr. 58.]

Petitioners also urged in their Closing Brief in the trial court, that "conspiracy" was a necessary element in the proof of illegality of the franchise [Tr. 47], and asserted that "the absence of conspiracy is equally fatal" [Tr. 52] to such proof.

Further proof that petitioners urged that there was no connection between any conspiracy and the lease-franchise agreement is found in the District Court's understanding of petitioners' contentions as expressed after the conclusion of the trial. The Court said [Tr. 144]:

> "Mr. Hardy definitely argued with me that at most—these are his words—that at most this was a contract between one producer, one theatre. He emphasized the 'one' time after time. He emphasized that *no other parties were interested*, and it is just one contract between one producer or one distributor and one exhibitor."

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In view of the above demonstration, there can be no question but that petitioners knew at the trial that the Court had under consideration the question whether the lease and franchise were unlawful by reason of being the product of a conspiracy between respondents, petitioner Partmar and other distributors and exhibitors. Petitioners defended the lawfulness thereof by asserting the independence of said franchise from any conspiracy.

The success with which petitioners urged the lack of connection between any conspiracy and the terms of the lease and franchise agreement is made apparent by the findings, conclusions and judgment of the Court. The Court concluded that the lease and franchise agreement between Paramount and Partmar were "in all respects legal." [Tr. 106-107.] It further concluded that "the clearance accorded to Partmar by Paramount pursuant to said franchise agreement was reasonable and *lawful.*" [Tr. 106-107.] In support of these conclusions just set forth are Finding 18 and Finding 20. In Finding 18 the clearances allowed petitioner Partmar for the Paramount Theatre is found to be reasonable and to apply only to theatres in substantial competition [Tr. 103], and in Finding 20 the Court found:

> "Neither said franchise agreement, nor said lease, nor any amendment to either of them constitute any part of, nor were they or any of them entered into as a result of any agreement, combination or conspiracy of any kind whatsoever between Paramount and any other person or persons, *nor between Partmar and any other person or persons.*" [Tr. 104.]

The italicized portion of this finding would, of course, be meaningless if the Court were not considering the legality of the competitive advantages afforded petitioner Partmar by the lease and franchise. As heretofore pointed out, the Court stated it was considering this question. (*Supra,* p. 8.)

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It is thus apparent that petitioner Partmar successfully asserted in defense of the First, Second and Fifth Causes of Action that the franchise and lease agreement were no part of any conspiracy in restraint of trade. They could not have obtained judgment sustaining their right to remain in possession of the theatre and to be free of damages for withholding such possession nor could they have obtained judgment declaring their right to continued performance of the lease and franchise had they not been successful in persuading the District Court that such was the case.

1. Issue Was Not Limited by Alleged Exclusion of Evidence or Striking of Affirmative Defenses in Petitioners' Answer.

To rebut this conclusive showing that the issue of connection between the lease and franchise agreement and any conspiracy was an issue in the determination of the First, Second and Fifth Causes of Action, petitioners point to alleged exclusion of evidence in relation to conspiracy. (Pet. Br. 9, 18-19.) In this respect petitioners specify the striking of the defenses pleaded by petitioners and the admission into evidence of the judgment in *United States v. Paramount Pictures, Inc.*, for the limited purpose of showing the injunctive provisions thereof. None of these matters give any indication that the issue was as contended by petitioners "confined to the question whether the franchise was in unlawful restraint of trade standing alone and apart from conspiracy." (Pet. Br. 19.)

Illegality of the lease and franchise, if proved, would have established the First, Second and Fifth Causes of Action.[4] Consequently, such illegality was a material is-

[4]See discussion, *infra*, pp. 50-54.

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sue. The affirmative defenses set forth in petitioner's Answer were stricken because, of necessity, the illegality which would establish the First, Second and Fifth Causes of Action could not be a defense thereto. Nevertheless, the issue of whether the lease and franchise were legal, including the issue of whether they were connected with any conspiracy, remained in the case.

The Court did not, as contended (Pet. Br. 9), refuse "to give the judgment [in *United States v. Paramount Pictures, Inc.*] any evidentiary effect at all as to the existence of the conspiracy." Petitioners' statement attempts to create the impression that the Court would not permit petitioners to introduce the judgments in *United States v. Paramount Pictures, Inc.* into the record as a part of their evidence on the First, Second and Fifth Causes of Action. (Pet. 9-10.) This impression could not be further from the truth. The fact is that the Court invited petitioners to introduce it as a part of their evidence. The Court said:

> "Well, when it comes your turn, if you want to introduce it or make a motion that it be received *in toto* you can." [Tr. 131.]

Petitioners well knew that their turn was when they put on their case-in-chief with respect to the First, Second and Fifth Causes of Action. Nothing in the Court's remark suggests that he referred to the trial of the Counterclaims. Petitioners, however, made no effort to have the judgment received *in toto* though they took several court days to present their case in chief. Moreover, the Court said in this connection:

> "It is before the court and the court would read the decision in any event without it being introduced into evidence." [Tr. 130.]

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B. A PARTY WHO ASSUMES A CERTAIN POSITION IN A LEGAL PROCEEDING, AND SUCCEEDS IN MAINTAINING THAT POSITION, IS PRECLUDED AND ESTOPPED FROM ASSERTING A CONTRARY POSITION THEREAFTER.

Litigants may not play fast and loose with courts of justice. Consequently, when they have once asserted a given position in a legal proceeding and have succeeded in having the court adopt this position, they may not thereafter urge a contradictory view. This rule, which has been applied in a wide variety of circumstances, is well founded in both authority and reason.

A leading case is the decision of this Honorable Court in *Davis v. Wakelee,* 156 U. S. 680 (1895). In an action for an injunction to restrain the defendant from asserting the invalidity of a judgment in other suits to be brought thereon, it was admitted by the parties and held by the court that the judgment actually was void for lack of personal service upon the defendant. However, in a prior proceeding in which defendant was adjudicated bankrupt and was given a discharge, plaintiff had opposed discharge. He had been defeated in this opposition by the assertion advanced by defendant that since plaintiff had obtained a state court judgment which was in full force and effect, a discharge would not affect his claim, and he therefore had no standing to object thereto. The trial court held the defendant estopped to raise the invalidity of the prior judgment and enjoined him from doing so.

In affirming this judgment, the Court said:

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his inter-

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ests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him . . .

"It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and in a subsequent proceeding upon such judgment, claim that it was rendered without personal service upon him. Davis may possibly have been mistaken in his conclusion that the judgment was valid, but he is conclusively presumed to know the law, and cannot thus speculate upon his possible ignorance of it. He obtained an order which he could only have obtained upon the theory that the judgment was valid—his statement that it was in force was equivalent to a waiver of service, a consent that the judgment should be treated as binding for the purposes of the motion, and he is now estopped to take a different position." (Pp. 689 and 691.)

The decision in *Davis v. Wakelee, supra,* is discussed in *Davis v. Cornwall,* 68 Fed. 522 (2d Cir., 1895), cert. den. 163 U. S. 683. In this companion action the same debtor sought to set up his discharge in bankruptcy as a defense to a judgment in favor of another creditor whose objections to his discharge had also been overruled by the bankruptcy court on the "ground (urged by the bankrupt) that the discharge could not affect the judgment." The decision in *Davis v. Wakelee, supra,* was held controlling. In this respect the court said:

"This decision is controlling, and renders any discussion of the question now before us superfluous. The appellant attempts to parry the force of the decision by urging that the case then before the court

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differed from the present case, inasmuch as the estoppel was based upon the defendant's false assertion of fact in the bankruptcy proceeding that the judgment was in full force. The court, however, *did not consider the case upon the rules applicable to the common estoppel which springs from the misrepresentation of fact, but put its conclusions upon the salutary doctrine of estoppel, which prohibits parties from playing fast and loose with the courts of justice.*[5] Indeed, all the statements in the petition which was the basis of the order in the bankruptcy proceedings were matters of legal conclusion; and the court was of the opinion that although the defendant, in making them, was under a mistaken view of the law, that circumstance could not shield him from the effect of an estoppel. The plaintiff, as well as the defendant, was bound to know the law, and, by conclusive presumption, *could not have been misled* by the defendant's statement that the judgment was in full force, when in fact it was a nullity, because of want of jurisdiction of the court which rendered it. *He was prejudiced, not by any false statement of the defendant, but by the conduct of the defendant in procuring a disposition of his legal rights by a judicial tribunal to his disadvantage, and for the benefit of the defendant; and if he chose to acquiesce the defendant ought not to be permitted now, with the fruits of his conduct in his hands, to assert that what he then maintained was a delusion, and that the disposition made was wrong.*" (P. 525.)

It is submitted that this analysis of the decision in *Davis v. Wakelee, supra,* is correct and that so construed it is directly applicable to the facts in the present case. Peti-

[5]Italics here and elsewhere in this brief are added unless otherwise noted.

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tioners have "the fruits" of their "conduct" in their hands in the form of performance of the franchise for the balance of its term, exhibiting first-run in Los Angeles all Paramount pictures licensed thereunder, to the exclusion of all other exhibitors, and with full clearance over all theatres in the Los Angeles area together with their immunity from damages and eviction and the declaration of their right to continued performance of the lease and franchise. To permit them now to contend that the lease and franchise are parts of an unlawful conspiracy would be to allow them to play "fast and loose with courts of justice."

The same rule was applied by this Honorable Court in *Philadelphia, Wilmington & Baltimore Railroad Co. v. Howard,* 54 U. S. 307 (1851). The plaintiff and his brother had previously instituted an action against the defendant's corporate predecessor which merged into defendant between the time the former action was filed and the time it was tried. In this former action plaintiffs relied upon a certain document as being a valid existing contract of this predecessor corporation. Counsel for the defendant appeared in the name of the predecessor and asserted that a different document was the valid controlling contract in issue. The court in the other proceeding ruled for the defendant therein on the basis of this contention. Thereafter plaintiff commenced the subsequent suit relying on the document set up by the defendant in the prior action as being the controlling document. The defendant, however, reversed its contention and denied the document's validity for lack of the corporate seal. The court below instructed the jury that if it found the facts to be as above set forth, the defendant should not be permitted to deny the validity of the

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document sued on. The judgment was for the plaintiff and it was affirmed on appeal. The Court said (p. 336):

> "Defendant . . . defeated the action in Cecil County Court, by asserting and maintaining this paper to be the deed of the company . . .
>
> "We are clearly of opinion that the defendant cannot be heard to say, that what was asserted on the former trial was false, even if the assertion was made by mistake. If it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, *and it is too late to correct it.* It does not carry the estoppel beyond what is strictly equitable, to hold that the representation which defeated one action on a point of form should sustain another on a like point."

To like effect is *Officer v. J. L. Owens Co.,* 252 Fed. 337 (8 Cir., 1918). The defendant in the present action had sued the plainitff in a prior action for breach of the conditions of a contract. He had given six promissory notes to secure performance. In the course of the trial of this prior action, the court instructed the jury that one of the elements of damage would be the face value of the six promissory notes since the plaintiff therein continued to be liable thereon. A judgment was rendered for the plaintiff in that action, the defendant in the present action, and the same became final. In the present action, upon being sued upon the notes, he defended on the ground that the notes were voidable for lack of consideration, this position being inconsistent with the theory upon which he was awarded damages including the face amount of the notes in the preceding action. The court held that the defense of lack of consideration could not be raised by defendant, saying (p. 342):

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> "There is another reason why he may not defeat the enforcement of his liability upon these notes, and that is that he has obtained and has collected a part of a judgment against the Company for damages allowed to him in No. 338 on the express ground that he is liable to pay the notes for $10,000 and interest. *His acceptance of the benefit of the first judgment raises a quasi estoppel against him from asserting in this action that he is not liable.*"

In this particular case it is notable that the person held estopped had not even urged the court in the prior proceeding to adopt the inconsistent view. He had not, however, corrected the court in this respect, and this was held a sufficient basis for preventing him from taking the contrary position. The court said (p. 343):

> "If there was error in those respects in the trial of No. 338, *counsel could have corrected them in that case, but it cannot do so in this.*"

In *Queenan v. Mays,* 90 F. 2d 525 (10th Cir., 1937), cert. den. 302 U. S. 724, a prior action had been brought by Mays to recover from a county certain bonds deposited by Mays in a bank, which had in turn been pledged by the bank to the county to secure the latter's deposit with the bank. Neither the bank nor its later appointed receiver was a party to this prior action. In this prior action the court held in favor of the county on its contention that it had accepted the bonds as a pledge of the bank's assets and was a bona fide purchaser thereof. In the present litigation brought by Mays against the bank and its receiver for the value of the bonds, the receiver cross-complained against the county, seeking to recover from it the value of the bonds on the ground that the bank had no power to secure its deposits by pledging its

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assets. The county defended this cross-complaint on the ground that the bonds were not pledged as assets of the bank but as Mays' bonds. This was a theory which was of course directly contrary to that asserted in the former action. The court refused to permit this defense to be made by the county, saying (p. 533):

> "Furthermore, the county is in no position to assert the bonds were pledged as Mays' bonds and not as bonds of the bank. The county defeated Mays in the state court suit by establishing the fact that it took the bonds as the property of the bank. It here seeks to defeat the bank by establishing the fact that the bonds were the property of Mays. The county must be consistent. Since Mays never authorized the pledge, the county could only prevail as to Mays by showing that it dealt with the bonds as property of the bank; failing in that, it must have lost as to Mays. Having taken that position, it should not now be permitted to defeat the receiver by reliance upon the fact that the bonds were not the property of the bank . . .
>
> ". . . The apposite principle of law is laid down in Davis v. Wakelee, 156 U. S. 680, 689, 15 S. Ct. 555, 558, 39 L. Ed. 578, as follows: [quoting portion quoted *supra.*]"

In *Chandler v. McKerral,* 68 F. 2d 343, 346 (7th Cir., 1934), the defendant receiver of an insolvent corporation was held estopped to deny the plaintiff's claim of prior right to a court deposit made by such receiver. The deposit had been made in order to vacate a temporary restraining order in a prior stage of the proceedings. In an intervening proceeding *between the receiver and a different creditor,* such receiver had represented to the court that the present plaintiff's claim had priority as to these

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moneys and that they therefore could not be attached by such second creditor. In the last proceeding, the receiver asserted that plaintiff's claim had no such priority. In precluding the receiver from making this last assertion, the court said:

> "This position thus solemnly and deliberately taken cannot now be repudiated."

To the same effect: *Hughes v. Ward Oil Corporation,* 124 F. 2d 393, 395 (5th Cir., 1941).

This doctrine of preclusion against assertion of inconsistent positions in judicial proceedings, sometimes referred to as "judicial estoppel," though akin to *res judicata* and collateral estoppel, must not be confused therewith.

An excellent article, *Beck, "Estoppel Against Inconsistent Positions in Judicial Proceedings,* 9 Brooklyn Law Review, pp. 245-262, analyzes the doctrine. In this article, this doctrine is differentiated from *res judicata,* collateral estoppel, and other types of estoppel and its rationale analyzed. The author characterizes the rule as follows:

> "It is 'that a man should not be permitted "to blow hot or cold" with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interests.'" (P. 245.)

and, further,

> "The gravamen of this type of estoppel, therefore, is not reliance by the other party to his resultant detriment, but rather in having deliberately taken a legal position, from which the courts will not permit one to recede, for purposes of convenience. *It is clearly a rule born of the necessity of orderly administration of our judicial system."* (P. 248.)

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The author cites and discusses numerous cases from a wide variety of jurisdictions as authority for this rule,[6] including those already briefed herein. In order to avoid lengthening this brief beyond proper bounds, we refer the Court to this article for a discussion of these cases. The author concludes the article by stating:

> "The foregoing cases demonstrate the effectiveness of this salutory doctrine as a restraining influence upon those *who would conduct themselves in a court-room as if it were a gaming room.* Repeated application thereof may compel an appreciation on the part of litigants, that observance of a high degree of honesty in their dealings with their adversaries and with the courts, is a rule of conduct which self-interest requires." (P. 262.)

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[6] *Houghton v. Thomas,* 220 App. Div. 415, 422, *et seq.,* 221 N. Y. Supp. 630 (1927), aff'd 248 N. Y. 523, 162 N. E. 509 (1928);
Horn v. Bennett, 253 App. Div. 630, 632, 3 N. Y. S. 2d 525 (1938);
Assets Realization v. Roth, 226 N. Y. 370, 374, 123 N. E. 743 (1919);
National Steamship Co. v. Tugman, 143 U. S. 28, 32 (1891);
McDonald v. Ruggiero, 144 App. Div. 230, 129 N. Y. Supp. 77 (1911);
The State National Bank of Keokuk v. The Northwestern Union Packet Co., 35 Iowa 226, 229, *et seq.* (1872);
Perkins v. Jones, 62 Iowa 345, 348, 17 N. W. 573 (1883);
Murray v. Rubel Coal & Ice Corp., 234 App. Div. 895, 254 N. Y. Supp. 372 (1931);
Hamilton v. Frothingham, 71 Mich. 616, 628, *et seq.,* 40 N. W. 15 (1888);
Folger v. Palmer, 35 La. Ann. 843 (1883);
Richards v. McCormick, 119 Mich. 7, 77 N. W. 1116 (1898);
Bond v. Clark, 88 Mass. (6 Allen) 361 (1863);
Hamilton v. Zimmerman, 37 Tenn. 38 (1857);
Greer v. Canada, 119 Tenn. 17, 107 S. W. 970 (1907);
Winkler v. Korzuszkiewicz, 117 Kan. 261, 231 Pac. 46, 48 (1924);
Mills v. Hoffman, 92 N. Y. 181, 189, *et seq.* (1883).
To same effect are:
Hassberger v. General Builders' Supply Co., 213 Mich. 489, 182 N. W. 27 (1921);
In re Madison, 32 N. M. 252, 255 Pac. 630 (1927).

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Another instructive article is found in 59 Harvard Law Review 1132-1136, where the author criticizes the confusion of this doctrine by some courts with the doctrines of collateral estoppel and *res judicata*. It is there pointed out that this doctrine is "a rule of public policy," which "arises out of the need to preserve the dignity of judicial proceedings and uphold the sanctity of the oath." (P. 1133.)

This same matter is treated in Bigelow on Estoppel (3rd Ed., 1882), page 601, as follows:

> "If parties in court were permitted to assume inconsistent positions in the trial of their causes the usefulness of courts of justice would in most cases be paralyzed; the coercive process of the law, available only between those who consented to its exercise, could be set at naught by all. But the rights of all men honest and dishonest are in the keeping of the courts, and consistency of proceedings is therefore required of all those who come or are brought before them.
>
> "It may accordingly be laid down as a broad proposition that one who has taken a particular position in the course of a litigation must, while that position remains unretracted, act consistently with it . . ."

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C. MUTUALITY IS NO PART OF THE DOCTRINE OF PRECLUSION AGAINST ASSERTION OF INCONSISTENT POSITIONS.

The fact that there are third party defendants to the Counterclaims who are not parties to the First, Second and Fifth Causes of Action does not affect the applicability of the rule just stated. Mutuality is not a requirement of preclusion and judicial estoppel. It is apparent from the nature of the doctrine, that any requirement of mutuality of estoppel is out of place. It is of no significance to the purpose of insuring orderliness, regularity and expedition in litigation or in protecting the dignity of judicial proceedings whether there is mutuality.

Beck, "Estoppel Against Inconsistent Positions in Judicial Proceedings," supra, 9 Brooklyn Law Rev. 245, states (p. 247):

> "Though there be no reliance and resultant damage, *nor mutuality,* one may nevertheless be estopped from asserting the truth, *not merely as to the parties to a litigation, or their privies, but generally and for all purposes.* In Philadelphia, Wilmington & Baltimore R. R. v. Howard, the contention that the estoppel was effective only as to the immediate parties in the prior proceeding, was overruled by the Supreme Court."

The comment in 59 Harv. Law Rev. 1132, *supra,* states (p. 1134):

> "The primary distinction in practice between the principle of preclusion on the one hand and *res judicata* and collateral estoppel on the other is that, while the latter doctrines require identity of parties, the former may be invoked by a person not a party to the first suit against one who was either a witness or a party in that suit . . .

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> "By clearly marking the distinction between these doctrines, a court dealing with inconsistent positions will be able to free itself from questions of privity and *mutuality,* which are concomitants of the *res judicata* principle."

In *Philadelphia, Wilmington & Baltimore R. R. Co. v. Howard,* 54 U. S. 307 (1851), referred to in the quotation from Beck, *supra,* the Court, in treating of the admissibility of the evidence concerning the assertion of validity of the contract in the prior proceeding, which evidence was held sufficient to prove an estoppel, said:

> "It is objected that the parties to that suit were not the same as in this one; but this is wholly immaterial. The evidence does not derive its validity from any privity of parties." (P. 332.)

This Honorable Court reached the same conclusion in *Missouri v. Chi. B. & Q. R. R.,* 241 U. S. 533 (1916). The railroad had brought a prior injunction suit against state officers to restrain enforcement of a statute fixing railroad rates claimed to be confiscatory. The state was not a party to this proceeding, which determined rates were nonconfiscatory. In an action by the state to recover the amount of passenger fares in excess of rates established, the railroad was held estopped to assert the defense of confiscation. As stated by the Court (p. 541):

> ". . . The contention is that the previous decree is here inapplicable since the state was not a party to the litigation in which the decree was entered, indeed, could not have been made a party without its consent."

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The Chief Justice pointed out that (p. 542):

> ". . . the question here is not how far the decree relied upon was binding upon the parties who were not technical defendants, but how far it is binding upon the railroad."

The basis of the estoppel imposed was the inconsistency of the positions taken by the railroad. The Court said (p. 542):

> "The right to restrain the whole power having been enjoyed for the purpose of the complaint as to confiscation which was made, the contrary cannot be asserted in order to escape the effect of the decree holding that such complaint was erroneously made."

And (p. 543):

> "As it results from what we have said that in our opinion by the application of the most elementary principles of estoppel the railroad may not be heard to disavow what it asserted in order to secure the suspension of the rate law during the suit, it follows that it was without right in this case to assert the defense of confiscation and the motion to strike out the same must therefore prevail."

In both *Queenan v. Mays,* 90 F. 2d 525, ***supra,*** and *Chandler v. McKerral,* 68 F. 2d 343, ***supra,*** there was no mutuality of estoppel, yet the litigant who was a party to the prior litigation was held to be precluded from taking inconsistent positions.

To same effect:

> *Rand v. Gillette,* 199 N. C. 462, 154 S. E. 746 (1930).

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III.

THE FACT THAT THE LEASE AND FRANCHISE AGREEMENT DID NOT CONSTITUTE ANY PART OF AND WERE NOT A RESULT OF ANY CONSPIRACY IN RESTRAINT OF INTERSTATE TRADE IS RES JUDICATA.

In the trial of the First, Second and Fifth Causes of Action, the issue of the legality of the lease and franchise agreement was raised by the pleadings, litigated by the parties and properly considered by the Court. The determination made of this issue was that the lease and franchise agreement were not a part of or the result of any conspiracy in restraint of interstate trade, and therefore were lawful. This determination, made in the trial of the First, Second and Fifth Causes of Action, is conclusive against petitioners in respect of their First, Second and Fourth Counterclaims.

A. THE ISSUE OF CONNECTION BETWEEN THE TERMS OF THE LEASE AND FRANCHISE AGREEMENT AND ANY CONSPIRACY WAS IN ISSUE, WAS LITIGATED AND WAS DETERMINED IN TRIAL OF FIRST, SECOND AND FIFTH CAUSES OF ACTION.

The issue of connection between the lease and franchise and any conspiracy was actually litigated at the trial of the First, Second and Fifth Causes of Action. It was properly so litigated since it was raised by the pleadings. The consideration of this issue by the Court was necessary under California law, and did not involve enforcement of rights arising out of an illegal contract. The result of the litigation of this issue was the determination by the Trial Court that the lease and franchise

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were not connected with any conspiracy, not merely that these agreements were lawful "standing alone."

1. THE ISSUE OF CONNECTION BETWEEN THE TERMS OF THE LEASE AND FRANCHISE AND ANY CONSPIRACY WAS LITIGATED.

As is demonstrated in Chapter II-A, of this brief *infra,* (pp. 23-29) the issue of the legality of the lease and franchise agreement was a principal issue in the trial of the First, Second and Fifth Causes of Action, and a subsidiary issue upon which its determination depended was whether the lease and franchise agreement were part of or the result of any conspiracy in restraint of interstate trade. It is there demonstrated that in order to sustain the validity of the provisions of the lease and franchise agreement giving petitioner Partmar a license to exhibit all of respondent Paramount's product first run and with a clearance over all subsequent runs, for a period of ten years, petitioners were obliged to urge that the lease and franchise agreement was a single agreement between respondents and petitioners and not a part of or a result of any conspiracy with other persons.

2. THE LEGALITY OF THE LEASE AND FRANCHISE AGREEMENT WAS PLACED IN ISSUE BY THE PLEADINGS.

The First, Second and Fifth Causes of Action sought restitution of possession of the theatre and a declaration that the lease had been terminated. [Tr. 25.] Paragraphs 12 and 13 of the complaint [Tr. 17] state a claim on the part of respondents that the lease was terminated *by reason of the fact that the franchise was terminated.* The Court found [Tr. 96] that though two documents were executed the lease and franchise agree-

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ment constituted but one inseverable agreement. The facts supporting this finding were fully pleaded. [Tr. 5-11.]

An agreement which is illegal is in law terminated. *Doherty v. Monroe Eckstein Brewing Co.,* 191 N. Y. S. 59 (1921), where the court said:

> ". . . When, therefore, on the 29th of January, 1920, the principal use of the premises for saloon purposes became *unlawful, the lease became terminated by operation of law* in the absence of any agreement between the parties for a different use of the premises thereunder . . . There is no distinction in principle on this point between a contract the execution of which is unlawful at the time it is made and which is void under the authorities cited and one where by a subsequent change of law further performance of the contract becomes unlawful." (Pp. 61-62.)

To the same effect, see *O'Neill v. Derderian,* 246 N. Y. S. 341, 344 (1930), where the court said:

> "The express restricted purposes of the hiring now being prohibited by law, *the lease is brought to an end.*"

Though respondents did not plead the conclusion that the franchise was unlawful, the facts bearing upon its legality were pleaded.

In Paragraph VI of the complaint [Tr. 8-9], the terms of the franchise which raised the issue of its legality are fully set forth, including the provision granting Partmar a license upon all Paramount pictures first run for a period of ten years.

Under the Federal Rules of Civil Procedure, the pleadings were sufficient to raise the issue of whether the

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franchise violated the Sherman Act and therefore the entire lease and franchise agreement was unlawful and terminated by operation of law. Under these Rules, the purpose of pleadings is to give fair notice to the adversary of the nature and basis of the claim asserted and a general indication of the type of litigation involved. A plaintiff accordingly is not held to the exact allegations of his complaint; any facts proved which justify the relief sought and fall within the category naturally supporting the general claim asserted are properly considered by the court.

The sufficiency of pleadings to raise this identical issue was considered in *Southside Theatres v. United West Coast Theatres Corp.*, 178 F. 2d 648 (9th Cir., 1949). The defendant attacked the jurisdiction of the District Court on the ground that no federal question was raised in the complaint. The complaint, as does the complaint herein, recited the facts as to the provisions of a joint venture contract between the parties and described the findings and conclusions made in *United States v. Paramount Pictures, Inc.* The plaintiff likewise relied upon the agreement contained in the contract with respect to which declaratory relief was sought, to the effect that the venture should be terminable in the event performance should be enjoined. The jurisdiction of the District Court was upheld. The Court of Appeals described the allegations of the complaint held sufficient in this respect as follows (p. 651):

> "While it appears from the foregoing summary that the plaintiffs *stressed their right to terminate the joint venture agreement pursuant to the provisions of the termination agreement and the proceedings in the antitrust suit brought by the government*

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> *in the New York District Court,* we think the complaint nevertheless sets forth sufficient facts *to raise the issue that the joint venture agreement violated the Sherman Act.* It is alleged that plaintiffs and defendants, competitors in the theatre business, entered into a contract for the joint operation of their rival theatres under an arrangement whereby the profits were to be shared but both properties were to be under the direction and control of the plaintiffs, and that other similar pooling arrangements had been held to constitute violations of the Sherman Act. Although not well pleaded, and lacking the emphasis given by the pleader to the termination agreement and the findings and decree of the New York District Court, such factual allegations, we think, sufficiently show a substantial controversy with reference to the validity of the joint venture agreement under the Sherman Act, in the posture of the instant case."

This holding upon facts practically indistinguishable from those in this case is amply supported by other decisions dealing generally with the sufficiency of pleadings under the Federal Rules of Civil Procedure.

Continental Colleries v. Shober, 130 F. 2d 631, 635 (3rd Cir., 1942), states the rule as follows:

> "Under the Federal Rules of Civil Procedure the function of the complaint is to afford fair notice to the adversary of the nature and basis of the claim asserted and a general indication of the type of litigation involved . . . Technicalities are no longer of their former importance, and a short statement which fairly gives notice of the nature of the claim is a sufficient compliance with the requirements of the rules."

Komer v. Shipley, 154 F. 2d 861 (5th Cir., 1946), dealt with the question of variance between the pleadings

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and the proof under Federal Rules of Civil Procedure, and held that the plaintiff is not required to prove the exact allegations of this complaint, the court saying (pp. 862-863):

> "Since the plaintiff's pleading afforded defendant a generalized summary of the case, it complied with the rules of pleading applicable to the federal district court.
>
> "Vol. 1, Moore on Federal Practice, at page 450, states:
>
> > " 'The pleading rules are designed to develop the respective stories of the parties as to the past events out of which the litigation grew. They are not restricted by worry and confusion about the form of trial.
> >
> > * * * * * * * *
> >
> > " '* * * at the trial stage the case is to be heard on the merits, *and is not to be* hamstrung by faulty pleadings, unless actual, not conjectural, prejudice results from the faulty pleadings.' "

Counsel for respondents made it plain that the issue of legality of the lease and franchise was necessarily involved in the trial of the First, Second and Fifth Causes of Action at least as long as 1½ years before the commencement of the trial. In arguing motions for summary judgment the grounds of alleged illegality of the franchise and lease were set forth. [Tr. 113-114.] Likewise at the opening of the trial, counsel for respondent in his opening statement presented the same issue. [Tr. 119-120.] It is therefore obvious that no "actual" prejudice could possibly have resulted to petitioners if the complaint did not clearly raise the issue of illegality (which we think it did).

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3. California Law Allowed Owner of Theatre Its Possession if Lease-Franchise Were Illegal. Enforcement of Rights Arising Out of Illegal Contract Was Not Involved.

It is asserted by petitioners that the District Court violated "the rule against aiding wrongdoers" in entertaining the suit of respondents for restitution of its property and a declaration of its rights on the theory that the contract between petitioners and respondents was unlawful. (Pet. Br. 20-21.) Petitioners cite, in support of their contention, *Warner Bros. v. Cooper Foundation,* 189 F. 2d 825 (10th Cir. 1951), and *Fabacher v. Bryant,* 46 La. Ann. 820. Neither of these cases is controlling.

In *Warner Bros. v. Cooper Foundation,* Warner Bros. sought to impose a constructive trust upon a ten-year lease of a theatre. Warners had no interest in this lease except such as might arise out of a pooling agreement upon the existence of which the alleged fiduciary duty was wholly dependent. The Court merely held it would not enforce an alleged right which existed solely by virtue of an illegal contract. Thus, when the Court said that the right sought to be enforced grew out of an illegal contract, it meant that it was a right which depended upon such illegal contract being given force.

Fabacher v. Bryant is in the same category as the *Warner Bros.* case. The Court merely refused to entertain a claim for damages for breach of a contract forced upon the defendant by unlawful union activities.

These holdings, of course, have no relation to the case at bar. Respondents owned the theatre, possession of which petitioners were withholding, and aside from the existence of the lease and franchise agreement, the legality of which was questioned, petitioners were trespassers

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in possssion without right. Respondents' claimed right to possession arises out of its ownership and does not "grow out of" the lease and franchise agreement. The only effect of the illegality of the lease and franchise agreement is to make it ineffective to entitle petitioners to withhold possession from respondents.

Under these circumstances the Trial Court's view [Tr. 142] that respondent Paramount Pictures Theatres Corporation, as owner of the property, was entitled to possession if the lease under which Partmar held possession was illegal and void, was entirely correct.

The California law, which is controlling as to the right to possession of property in an action brought in the Federal District Court on the ground of diversity of citizenship, is correctly set forth in the decision in *Glos v. McBride,* 47 Cal. App. 688, 191 Pac. 67 (1920). A lease of real property was based upon an illegal consideration, and the lease was held illegal *in toto.* Nonetheless, the landlord was held to have the right to repudiate and abandon the lease and to recover possession of the property and have redress for the unexpired term. The Court pointed out the difference between an illegal contract, which is fully executed, and one which is unexecuted or which has some period yet to run. The Court said (p. 690, 191 Pac. at p. 67):

> "While, as to executed contracts of such nature this is a rule of almost universal application, it is equally true that as to like [illegal] contracts, which are unexecuted, the law recognizes what is termed *a locus penitentiae* accorded to a plaintiff, which, as applied to the facts here presented, is an opportunity to repudiate the agreement and refuse to be a party to the acts contemplated thereby."

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The lessor was thus permitted to recover possession o her real property by proving that the lease, pursuant t which it was occupied by the defendant, was unlawfu the Court saying (pp. 690-691, 191 Pac. at p. 68):

> "Conceding, however, that she [plaintiff] did en ter upon the life with defendant, as contemplated i the agreement, we do not think it can be said he day of repentance was past. The contract contem plated a continuing immoral relation, which, in ou opinion, even though entered upon, plaintiff in th *locus penitentiae* accorded to her, might at any tim repudiate and discontinue; and while the law woul afford her no relief for the use of the leasehold es tate covering the expired portion thereof it should *as to the unexpired term* thereof, and upon a showin of repentance, abandonment and discontinuance o the shameful relation, grant her redress. In ou opinion the court erred in sustaining the demurrer.'

To a like effect is *Green v. Frahm,* 176 Cal. 259, 16 Pac. 114 (1917), in which the Court said (p. 263, 16 Pac. at p. 116):

> "In the first place, the plaintiff is not suing on an contract embodied in the lease. His right of actio arises from the termination of the lease, whereb the purpose for which his money was deposited wa defeated and he has become entitled to its return . . . The asserted illegality was in the lease, no in the rights growing out of its premature termina tion by the judgment. The doctrine that one canno recover upon a contract that is against public policy does not apply."

See also, *McKinney v. Andrews,* 41 Tex. Rep. 36 (1874), and *Hall v. Corcoran,* 107 Mass. 251, 256-7 (1871).

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It was thus entirely proper for the Court to consider the question whether the lease and franchise agreement was illegal in determining whether respondent should be given restitution of possession of the property and a declaration that the lease was terminated.

It is apparent, moreover, that this review is not an appropriate one in which to raise the propriety of the District Court's action considering the legality of the lease and franchise agreement. The rule of law relied upon by petitioners, besides being inapplicable, does not affect the jurisdiction of the Court and a violation thereof would at most be error. This proceeding, by the order of this Honorable Court, has been restricted to the question of the propriety of the dismissal of the Counterclaims and any attack upon the judgment on the First, Second and Fifth Causes of Action is therefore a collateral attack It is obvious, therefore, that mere matters of alleged error cannot be raised.

This is all the more true since petitioners are enjoying the benefits of the judgment on the First, Second and Fifth Causes of Action. Such being the case, it is immaterial whether such judgment is erroneous in this respect or not.

In *Davis v. Wakeley,* 156 U. S. 680, *supra,* it was admitted by the parties and held by the Court that the judgment in the prior action was based upon an erroneous legal position. Still the estoppel to deny its effect was imposed.

This is made more apparent by the decision in *Davis v. Cornwall,* 68 Fed. 522, *supra,* in which it is pointed out that, despite the fact that both the parties to the prior litigation are presumed in law to know that the

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disposition there made was erroneous, a party who successfully urges a view upon the Court cannot gainsay the effect of the judgment he has procured.

Even more emphatic is the decision in *Officer v. J. L. Owens Co.*, 252 Fed. 337, *supra*, in which the prior action erroneously included the amount of certain notes as an element of damages, and the plaintiff therein, defendant in the subsequent action, was held precluded from asserting the lack of consideration for the notes. In this case the Court said (p. 343):

> "If there was error in those respects in the trial of No. 338, counsel could have corrected them in that case, *but it cannot do so in this.*"

4. District Court Did Not Determine Merely That Lease and Franchise Were Legal "Standing Alone"; but Expressly Found There Was No Connection Between Them and Any Conspiracy.

Petitioners assert, over and over again (*e.g.*, Pet. Br. 11, 12, 15, 24, 26 *et seq.*), that the District Court merely adjudicated that the lease and franchise agreement were "not, *standing alone*, violative of the antitrust laws." They argue that such limited adjudication is not controlling as to "the issue of legality of the same acts and contracts in the context of conspiracy contrary to the antitrust laws." (Pet. Br. 26-31.)

The keystone of petitioners' argument seems to be that the Trial Court considered and determined the validity of the lease-franchise agreement "standing alone" and without considering its connection with any conspiracy to restrain trade. We have counted not less than 10 separate statements of the phrase "standing alone" in this

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connection in petitioners' brief. The premise is completely false. Mere repetition of a false premise does not enhance its stature.

This argument that the legality of the lease-franchise agreement was considered "standing alone" and apart from any conspiracy, is put up by counsel for petitioners in several different ways. Answering any one of them answers them all. For example, petitioners assert (Pet. Br. 11) that:

> "The briefs [in the Trial Court] on *both sides* considered only the question whether the franchise was a contract in unlawful restraint of trade, as a single contract, *standing alone* and apart from the conspiracy in the government case."

But Petitioners' Brief in the Trial Court stated exactly the contrary [Tr. 65] as follows:

> "On the evidence in this case, the Partmar franchise is neither one of a system, or made by one holding a dominant position, or *pursuant to a conspiracy.*"

Again, petitioners now assert (Pet. Br. 12) that the Trial Court's opinion:

> "shows that the question of the legality of the franchise *standing alone,* was considered, decided, and was decisive of the case."

And

> "The Court next considered the question whether the franchise was violative of the antitrust laws *standing alone and apart from the conspiracy.*" (Pet. Br. 12.)

But the Opinion of the Trial Court clearly and unequivocally shows the fallacy of that argument. The Trial Court's Opinion refers to the question of the legality of the lease-franchise agreement *generally* and without any

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limitation as to any single ground of claimed illegality. Petitioners' counsel simply interpolates into the Trial Court's Opinion the words "standing alone" when they are not found anywhere in the Opinion itself. The Trial Court said specifically in its Opinion [Tr. 77]:

> "Hence, we now proceed to the question of the legality of the franchise agreement."

There is no limitation in that language of the Trial Court. Moreover, the Opinion of the Trial Court, after reviewing the industry practices on runs and clearances and the like, said [Tr. 82]:

> "Paramount, *not in conjunction with any other major studio,* entered into the franchise agreement which gave to Partmar the right to exhibit the first-run feature pictures of Paramount in the City of Los Angeles."

The Opinion of the Trial Court further states [Tr. 88]:

> "In the case at bar, there is no proof of conspiracy."

and then proceeds to elaborate on this point [Tr. 89].

Not only was the issue of whether the lease and franchise agreement were part of a conspiracy litigated during the trial of the First, Second and Fifth Causes of Action (as pointed out, *supra,* Chapter II, A). Not only did counsel for petitioner in their closing brief in the Trial Court specifically urge upon the Trial Court that the Partmar franchise was not made pursuant to any conspiracy. [Tr. 65.] But the Trial Court expressly found that the lease and franchise were not a part or the result of any conspiracy whatsoever. The Court found:

> "20. Paramount, not in conjunction with any other major studio, entered into the franchise agree-

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ment which gave to Partmar the right to exhibit the first-run feature pictures of Paramount in the City of Los Angeles. Neither said franchise agreement, nor said lease, nor any amendment to either of them constituted any part of, nor were they or any of them entered into as a result of any agreement, combination or conspiracy of any kind whatsoever between Paramount and any other person or persons, nor between Partmar and any other person or persons." [Tr. 103.]

In the face of this finding, it is absurd for petitioners to contend that the Court found *only* that the lease and franchise agreement were legal "standing alone." The keystone of petitioners' brief is based on this demonstrably false premise.

B. FINDING OF FACT MADE IN TRIAL OF FIRST, SECOND AND FIFTH CAUSES OF ACTION IS CONCLUSIVE AGAINST PETITIONERS ON COUNTERCLAIMS.

The issue of connection between any conspiracy and the lease and franchise agreement which was determined in the trial of the First, Second and Fifth Causes of Action is, as hereinbefore demonstrated, the same issue as that raised by the First, Second and Fourth Counterclaims. Such being the case, the determination of this issue made in the trial of the First, Second and Fifth Causes of Action is conclusive against petitioners with respect to their Counterclaims. The fact that the Counterclaims are different causes of action does not mitigate against this conclusiveness, nor does the fact that there are additional parties defendant in the Counterclaims who were not parties to the First, Second and Fifth Causes of Action.

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1. A Judgment Is Conclusive as to All Facts Put in Issue and Actually Adjudicated Therein Whether the Subsequent Proceedings Are on the Same or a Different Cause of Action.

The rule is well settled that parties to a litigation cannot relitigate issues therein determined, either by reasserting the same cause of action or by challenging the determination in the trial of another cause of action. This principle is aptly stated in 50 C. J. S. 168-173, as follows:

> "A judgment rendered by a court having jurisdiction of the parties and subject matter is conclusive and indisputable evidence as to all rights, questions, or facts put in issue in the suit and actually adjudicated therein, when the same come again into controversy between the same parties or their privies even though, according to the decisions on the question, the subsequent proceedings are on a different cause of action, since the law ahbors a multiplicity of suits."

This Honorable Court has announced the same rule in its decision in *Southern Pacific Raiload v. United States,* 168 U. S. 1, 48-49 (1897), where the Court said:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been

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established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

This aspect of the doctrine of *res judicata* is explained by the Supreme Court of California in *Zaragosa v. Craven*, 33 Cal. 2d 315, 321, 202 P. 2d 73, 77 (1949):

> "The doctrine of *res judicata* has a double aspect. A former judgment operates as a bar against a second action upon the same cause, but in a later action upon a different claim or cause of action, it operates as an estoppel or a conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action."

2. THE CONCLUSIVENESS OF A FINDING IS NOT AFFECTED BY ADDITIONAL PARTIES NAMED AS COUNTER-DEFENDANTS.

The petitioners and third party plaintiffs, Partmar Corporation and Fanchon & Marco, Inc., are both parties to the First, Second and Fifth Causes of Action. As pointed out (Pet. 8) the Counterclaims named as third party defendants, Paramount Pictures, Inc., and several of its principal officials, in addition to Paramount Pictures Theatres Corporation, the plaintiff in the original complaint herein. The addition of these parties, none of whom were formally named as parties to the First, Second and Fifth Causes of Action, does not affect the con-

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clusiveness of the finding of fact made in the trial thereof with respect to the Counterclaims, when urged as a *defense* against petitioners who were parties thereto.

a. *Mutuality Is Not Required Where Res Judicata Is Urged as a Defense, if the Party Against Whom the Defense Is Urged Was a Party to the Prior Proceeding.*

Petitioners object that there is no "mutuality of estoppel" of the adjudication that the lease and franchise agreement were not part of any conspiracy. (Pet. 22-23.)

The growing view of the well considered recent decisions involving the question of "mutuality" in *res judicata* is that where *res judicata* is urged as a defense, mutuality is not required if the party against whom the defense is urged was a party to a prior proceeding. That is the precise point before this Court in this review. Petitioners were parties at the trial of the First, Second and Fifth Causes of Action and to the Judgment rendered thereon, including Finding 20. The *res judicata* arising out of Finding 20 is a complete defense to petitioners' Counterclaims.

All that is necessary to hold to sustain the conclusiveness of the finding in this case is that *res judicata* may be urged *as a defense* against anyone who was a party to a prior proceeding regardless of whether the person in whose behalf such defense is raised was a party thereto. No question of due process is involved in such holding since the person against whom the defense is effective has had his day in court on the issue in question. The objection therefore to the application of the doctrine of *res judicata* which was involved in *Robertson v. Gordon*, 226 U. S. 311 (1912), cited by petitioners, is not involved.

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It is not necessary for the purpose of this case to extend the doctrine so as to permit *res judicata* to be used as the basis for a claim by one not a party to prior litigation since it is only used in this action as a defense to petitioners' claim. The application of the doctrine of *res judicata* under these circumstances is supported by many well-reasoned authorities and advocated by most commentators on the subject.

Bruszewski v. United States, 181 F. 2d 419 (3rd Cir., 1950), cert. den. 340 U. S. 865 (1950). The United States was permitted to urge the defense of *res judicata* against a plaintiff who sued for personal injury suffered while working on a ship owned by the United States. The United States was not a party to the prior action in which plaintiff had sued a steamship company which was operating the ship under a "general agency service agreement." Lack of mutuality of the estoppel was urged by the plaintiff. Judge Hastie overruled this objection, saying:

> "The countervailing consideration urged here is lack of mutuality of estoppel. In the present suit Bruszewski would not have been permitted to take advantage of an earlier affirmative finding of negligence, had such finding been made in the Isthmian case. For that reason he argues that he should not be bound by a contrary finding in that case. But a finding of negligence in the Isthmian case would not have been binding against the United States because the United States had no opportunity to contest the issue there. The finding of no negligence on the other hand was made after full opportunity to Bruszewski on his own election to prove the very matter which he now urges a second time. Thus, no unfairness results here from estoppel which is

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not mutual. *In reality the argument of appellant is merely that the application of res judicata in this case makes the law asymmetrical. But the achievement of substantial justice rather than symmetry is the measure of the fairness of the rules of res judicata.*" (P. 421.)

". . . In all, we are satisfied that the present application of *res judicata* is both sound in principle and in accord with a substantial body of well-reasoned decisions." (P. 422.)

The same conclusion was reached by the Supreme Court of California in *Bernhard v. Bank of America,* 19 Cal. 2d 807, 122 P. 2d 892 (1942). In this case an estate was held precluded by *res judicata* from claiming the amount of a bank deposit in its suit against the bank. In a former action between the estate and another party it had been determined that the amount of the deposit had been the subject of a gift to a third person. The fact that the bank who raised the bar of the former judgment was not a party to this prior proceeding was held not to preclude its reliance upon the doctrine of *res judicata* as a defense. The issue as to the fact that the funds had been the subject of a gift was held to be precluded against the estate. In this connection the Court said (p. 811, 122 P. 2d at p. 894):

"The criteria for determining *who may assert* a plea of *res judicata* differ fundamentally from the criteria for determining *against whom* a plea of *res judicata* may be asserted. The requirements of due process of law forbid the assertion of a plea of *res judicata* against a party unless he was bound by the earlier litigation in which the matter was decided (*Coca Cola Co. v. Pepsi Cola Co., supra.* See cases

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cited in 24 Am. &. Eng. Encyc. (2d ed.) 731; 15 Cinn. L. Rev. 349, 351; 82 Pa. L. Rev. 871, 872.) He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. (*Ibid.*) There is no compelling reason, however, for requiring that the party asserting the plea of *res judicata* must have been a party, or in privity with a party, to the earlier litigation.

Perhaps the most discussed case, dispensing with the requirement of mutuality where *res judicata* is used as a defense, is *Coca-Cola Co. v. Pepsi-Cola Co.*, 36 Del. 124, 172 Atl. 260 (1934). Again the defendant was held entitled to urge *res judicata* though he was not a party to the prior proceeding. The court points out the lack of any sound basis for the requirement of mutuality under these circumstances saying:

". . . In 24 A. and E. Encl. (2d Ed.) 731, is given the only concrete basis for the rule that we have found. There it is said

" 'The rule that a judgment or decree concludes only parties or privies is based on that fundamental principle that no man can be deprived of his property except by due process of law, a principle which in the United States has been embodied in the Federal Constitution and in the Constitution of the several States.'

"In a great majority of cases this given reason may be satisfactory, but it is immediately apparent that it cannot always be so for it is obvious that it can have application only when the doctrine is invoked against one who had not been a party to the former proceeding. This reason fails when applied to one who had been a party to the former proceed-

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ings, for he has not been deprived of any due process in the presentation of his rights or claims.

"The doctrine of res judicata is primarily one of public policy and only secondarily of private benefit to individual litigants. It draws its strength not so much from the private advantage of the party seeking to invoke it, but its roots lie in the principle that public policy and welfare require a definite end to litigation when each of the parties has had a full, free and untrammelled opportunity of presenting all of the facts pertinent to the controversy." (p. 262.)

". . . The requirement of mutuality must yield to public policy. To hold otherwise would be to allow repeated litigation of identical questions, expressly adjudicated, and to allow a litigant having lost on a question of fact to reopen and re-try all the old issues each time he can obtain a new adversary not in privity with his former one." (P. 263.)

Other authorities likewise disapproving the requirement of mutuality under these circumstances are:

Slater v. Slater, 372 Pa. 519, 94 A. 2d 750 (1953);

Cohen v. Superior Oil Corporation, 16 F. Supp. 221 (D. C. Del., 1936), affirmed, 90 F. 2d 810, cert. den. 302 U. S. 726;

Cohen v. Dana, 83 N. Y. S. 2d 414 (Sup. Ct. 1948).

An able exposition of this subject is contained in 65 Harv. Law Rev. 818, 862-865, where the author clearly spells out the scope and limitations of the requirement of mutuality. When, as in this case, *res judicata* is used as a shield and not as a sword, mutuality is not required.

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The doctrine of *res judicata* is not an inequitable technicality, but rather a sound rule of public policy which should be applied wherever appropriate. In this respect this Honorable Court said in *Hart Steel Company, et al. v. Railroad Supply Company,* 244 U. S. 294 (1917) (p. 299):

> "This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever a judgment is entitled to respect."

(b) *The Res Judicata as to Mutually Estopped Counter-defendants Exonerates Other Counter-defendants.*

The only additional parties to the Counterclaims who were not parties to the First, Second and Fifth Causes of Action are the principal officials of Paramount Pictures, Inc., who were named and served. Paramount Pictures, Inc., though not formally named as a party to the First, Second and Fifth Causes of Action, clearly is bound by the judgment thereon. Not only was the plaintiff, Paramount Pictures Theatres Corporation, a wholly-owned subsidiary of Paramount Pictures, Inc., but the trial of the First, Second and Fifth Causes of Action was conducted by counsel representing both Paramount Pictures Theatres Corporation and Paramount Pictures, Inc. The obvious identity of Paramount Pictures Theatres Corporation and Paramount Pictures, Inc., as parties in this action was commented upon by the court in the Memo-

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randum of Opinion [Tr. 71], and was the subject of a conclusion of law to the effect that:

> "For the purpose of clarity of the transaction which is the subject of this action, plaintiff and Paramount Pictures, Inc., should be considered as 'Paramount.'" [Tr. 106.]

In accordance with this conclusion, the Court, throughout the findings, conclusion and judgment treated both Paramount Pictures Theatres Corporation and Paramount Pictures, Inc., as one party. This was consistent with his view that the lease and franchise should be considered as a single and inseverable agreement. [Tr. 74.] Petitioners made no objection to the Court treating Paramount Pictures Theatres Corporation and Paramount Pictures, Inc., as one party and, further, made no objection to its rendering a judgment that the franchise was "a valid subsisting agreement in full force and effect," upon Paramount Pictures, Inc. [Tr. 110.] In fact, petitioners still assert that there is "no factual distinction between" these respondents. (Pet. Br. 23, Fn. 1.)

The judgment, therefore, was in fact a judgment against Paramount Pictures, Inc., in so far as it adjudged the franchise agreement to be a valid and subsisting agreement in full force and effect, both because of the identity of or the privity between Paramount Pictures, Inc., as parent, and Paramount Pictures Theatres Corporation as wholly-owned subsidiary, *Hart Steel Co. v. Railroad Supply Co.*, 244 U. S. 294 (1917), and because of the active participation of Paramount Pictures, Inc., in the trial, *Ocean Accident & Guaranty Corp. v. Felgemaker*, 143 F. 2d 950 (6th Cir., 1944). Under these circumstances it is apparent that as to third party defendant and respondent, Paramount Pictures, Inc., there is mutuality.

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It is thus only as to the counter-defendants, who are the "principal officials" of Paramount Pictures, Inc., that there is any question of mutuality. As to these counter-defendants, the *res judicata* as to the two corporate defendants is effective to preclude recovery. The only conspiratorial acts alleged to have damaged petitioner Partmar in the First, Second and Fourth Counterclaims are the imposition of excessive terms in the lease and franchise agreement. These acts are acts of the corporate defendants, and if the other defendants, who are principal officers of the corporate defendants, participated in these conspiratorial acts, it is manifest that they did so in their capacity of officials of such corporations. It is an obvious, logical impossibility that the alleged conspiratorial act of the corporation could itself not be connected with any conspiracy while the acts of the officials who, in this respect could act only through the corporation, were part of such conspiracy. The culpability, therefore, of the individual counter-defendants, who are officials of respondents, can exist only if the act of the corporation through which alone they could have acted was culpable. It is *res judicata* that the acts of the corporate defendants were not culpable.

Where a party can only be culpable on the assumption that another party is culpable, but the lack of such culpability of such other party is *res judicata*, the requirement of mutuality is never applicable.

Portland Gold Mining Co. v. Stratton's Independents, 158 Fed. 63 (8th Cir., 1907). The lessor was held entitled to the benefit of a judgment in favor of his lessee that he had not trespassed upon the adjoining property in his mining operations. The court stated the applicable principle as follows (pp. 68-69):

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> ". . . If the defendant's responsibility is necessarily dependent upon the culpability of another, who was the immediate actor, and who in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel, even though he would not have been bound by it had it been the other way."

This Honorable Court approved the decision in *Portland Gold Mining Co. v. Stratton's Independents, supra,* in *Bigelow v. Old Dominion Copper Co.,* 225 U. S. 111, 127-128 (1912), where it was said:

> "An apparent exception to this rule of mutuality has been held to exist where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit, upon the same facts, when sued by the same plaintiff. See *Portland Gold Mining Co. v. Stratton's Independents,* 158 Fed. 63, where the cases are collected."

Thus, even though a requirement of mutuality should be held applicable under ordinary circumstances (and the respondents have demonstrated that it should not), the finding of lack of connection between any conspiracy and the lease and franchise agreement in the First, Second and Fifth Causes of Action would be conclusive against petitioners on their Counterclaims as to all respondents. Of course, even if the finding is not held conclusive as to the other third party defendants for lack of mutuality, the judgment must be affirmed as to Respondent Paramount. (1 Freeman on Judgments 907, Fifth Ed., 1925.)

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IV.

SINCE NO GENUINE ISSUE AS TO A MATERIAL FACT REMAINED, DISMISSAL OF COUNTERCLAIMS WAS PROPER.

As hereinbefore demonstrated, petitioners are precluded and estopped to prove a fact material to recovery upon their Counterclaims, and said issue of fact is *res judicata* against them. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure was therefore appropriate.

Petitioners were afforded the equivalent of a hearing upon such a motion, though no formal motion was made by respondents. The dismissal of the Counterclaims was not, as contended by petitioners (Pet. Br. 18),

> "without any previous notice to or knowledge of petitioners, without any hearing of any kind granted to petitioners, without affording petitioners at any time any opportunity whatever to present evidence in support of the claims, without requiring any evidence in rebuttal of the claims, and without the disclosure of any reason for dismissal by the District Court except the brief statement that 'we find no substantial evidence of a conspiracy in this case.' "

Petitioners were amply warned during the course of the trial that it was the Court's view that a determination in the petitioners' favor in the unlawful detainer cause of action or the declaratory relief cause of action would necessarily result in the dismissal of their Counterclaims. [Tr. 142.] Upon rendition of the Court's Opinion that the unlawful detainer and declaratory relief actions should be disposed of in petitioners' favor and that the Counterclaims should be dismissed [Tr. 94], petitioners submitted their proposed findings, conclusions and judgment

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which did not carry out this portion of the Court's decision. Respondents thereupon submitted findings, conclusions and a judgment embodying this decision. Thus, in effect, respondents requested the Court to bar the Counterclaims on the basis of the former judgment, findings, and conduct of the trial by petitioners, while petitioners on the other hand requested the Court not to dismiss the Counterclaims on this ground. It is not correct, therefore, for petitioners to assert (Pet. Br. 22) that respondents did not request the Court to apply preclusion and estoppel and *res judicata* in the dismissal of the Counterclaims.

The matter of settling the findings, conclusions and judgment was set for hearing on June 18, 1951. Petitioners were duly advised by the Opinion of the Court and by the submission of respondents' proposed findings of fact, conclusions and judgment [Tr. 104, 107-108], *that the issue of summary disposition of their Counterclaims was before the Court.* Petitioners appeared and opposed such summary disposition of their Counterclaims, on the ground, among others, that the issue in the First, Second and Fifth Causes of Action was not the same as that involved in the Counterclaims. [Tr. 143-147.] This is essentially the same contention they are making before this Honorable Court. There was no occasion for the introduction of any new evidence in relation to this contention. The hearing to settle the findings of fact, conclusions and judgment was as appropriate for the determination of this issue as any other hearing would have been. Petitioners had a hearing with respect to the question of whether there was a genuine issue as to the material fact of the alleged connection between the conspiracy set forth in the Counterclaims and the terms, conditions

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and charges imposed in the lease and franchise agreement. The hearing they had was the kind of a hearing that is universally accorded where such is the type of question under consideration. No sound reason is suggested by petitioners why, under these conditions, they should have had any other kind of a hearing, and it is manifest that logically no other type of hearing was called for. *The judgment dismissing the Counterclaims was in effect a summary judgment.* It was rendered in a situation in which summary judgment was appropriate.

A formal motion for summary judgment is not necessary to the validity of an order summarily dismissing claims with respect to which there is no genuine issue as to a material fact. The purpose of the summary judgment procedure is to expedite the disposition of cases when there is no genuine issue as to a material fact. This purpose is no less served when such circumstances appear to the court without a formal motion than where there is such a motion. Consequently, it is proper to award summary judgment to a party though such party has not moved the court for summary judgment.

Northland Greyhound Lines, Inc. v. Amalgamated Ass'n, etc., 66 F. Supp. 431 (D. C. Minn., 1946). A summary judgment for defendant was entered where plaintiff had filed a motion for summary judgment, but no cross-motion by defendant had been made. The court said (p. 433):

> "Although the parties draw different conclusions from certain facts, there is no controversion of any material fact and therefore no genuine issue for trial. Summary judgment is proper in such a case. Although Rule 56(c) provides in part 'the judgment sought shall be rendered forthwith if the pleadings,

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> depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law,' and *defendants here have filed no cross-motion,* it seems to me that where the case is properly disposable by summary judgment the court should enter whatever judgment is proper in the circumstances. . . . While it may be the better practice to file a cross-motion *I do not think that Rule 56(c) proscribes the court's power to enter judgment because of the mechanical failure of one of the parties to file a motion.*"

To like effect is *Hooker v. New York Life Ins. Co.,* 66 F. Supp. 313 (N. D. Ill., 1946), reversed on other grounds, 161 F. 2d 852. In this case defendant moved for a summary judgment and the case was disposed of by the granting of a summary judgment to plaintiff, who had not filed a cross-motion. In this respect the court said (p. 318):

> "There remains the question of the proper disposition of the case, since the plaintiff has not made a cross-motion for summary judgment. If the plaintiff had made such a motion, and if the defendant had admitted the facts which it so strongly urges, by way of affidavits, in favor of its motion, it would be clear that the plaintiff would be entitled to summary judgment. Since the purpose of the summary judgment procedure under Rule 56 is to expedite the disposition of actions in which there is no genuine issue of fact requiring trial, it would seem that the court can properly enter a summary judgment in favor of the party entitled to it."

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V.

JUDGMENT OF DISTRICT COURT AND COURT OF APPEALS MAY NOT BE REVERSED EXCEPT FOR ERRORS OR DEFECTS WHICH AFFECT THE SUBSTANTIAL RIGHTS OF THE PARTIES.

Petitioners could not in any event recover on their Counterclaims, since they are precluded and estopped from proving a fact essential to such recovery, and such issue of fact is *res judicata* against them. No error or defect in the procedure by which the Counterclaims were dismissed could, therefore, affect the substantial rights of petitioners.[7]

Errors or defects which do not affect the substantial rights of the parties are not grounds for reversal of the judgment of the courts below.

Title 28, U. S. C. A., Section 2111:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not effect the substantial rights of the parties."

Technical errors against litigants who cannot successfully prosecute or defend their case in any event do not constitute prejudicial error or affect the substantial rights of such litigants.

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[7]Respondents believe, of course, as shown in Chapter IV of this brief, that the procedure which was followed afforded appellants the substance of the kind of hearing to which they were entitled.

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Horning v. District of Columbia, 254 U. S. 135 (1920). The judge in the criminal prosecution for violation of a District of Columbia pawn broker's license regulation instructed the jury that the undisputed facts clearly established the offense charged. It was not permissible for the judge to direct a verdict. However, the instructions given were held not to constitute prejudicial error. The court said (pp. 138-139):

> ". . . Perhaps there was a regrettable peremptoriness of tone—but the jury were allowed the technical right, if it can be called so, to decide against the law and the facts—and that is all there was left for them after the defendant and his witnesses took the stand. If the defendant suffered any wrong it was purely formal since, as we have said, on the facts admitted there was no doubt of his guilt."

Forster v. Insurance Co. of North America, 139 F. 2d 875, 876-877 (2nd Cir., 1944):

> "Even if the denial of a jury trial was wrong it was harmless error for there was no issue of fact to submit to a jury."

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VI.

NO QUESTION OF NULLIFICATION OF THE DECISION IN UNITED STATES V. PARAMOUNT PICTURES, INC., IS INVOLVED.

Petitioners assert (Pet. Br. 31) that the decisions below have approved runs and clearances disapproved as unlawful restraints of trade by the decision in *United States v. Paramount Pictures, Inc.* They do not explain the significance of this assertion in their brief. In the petition, however, their argument is more expanded and indicates that the significance which they place upon this assertion is the "nullification of the benefit and authority of the *Paramount* case in the Ninth Circuit [which] will make it impossible for any motion picture exhibitor injured by reason of the conspiracy and restraint in that case, to prevail in any suit for damages or injunction." (Pet. 28.)

The order granting certiorari specifically limited the review to the "issue of dismissal of counterclaims." Any question as to runs and clearances in the Los Angeles area was thereby eliminated from the scope of this review. The order restricting this review is perfectly correct, since we have demonstrated that the findings and adjudication in the Trial Court on the various issues, including clearance and run were expressly urged upon the Trial Court by petitioners themselves and they are now precluded and estopped from taking a directly opposite position by way of collateral attack upon such findings and adjudication brought on by themselves. In view of the order limiting the scope of this review, Respondents do not understand why petitioners persist in their argument concerning runs and clearances.

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In the light of such limitations, Respondents believe that they should not argue this question at length. However, Respondents wish to point out three main factors in this connection:

1. There never has been a final judgment in the New York suit of *United States v. Paramount Pictures, Inc.*, as to respondent Paramount, in which it has been determined that there was a conspiracy effective with respect to run and clearance in the Los Angeles area. Much less has there ever been any final judgment against respondent Paramount in the New York case that there was any such conspiracy effective as to the first-run exhibition of Paramount pictures in the Los Angeles area.

(a) It is elementary that Section 5 of the Clayton Act makes a judgment in a prior government case admissible in a private treble damage action only if the prior judgment was final as to the party against whom it is offered in the private suit, and only as to matters there determined in respect of which it would be an estoppel as between the parties thereto.

(b) It is also elementary that under Section 5 of the Clayton Act it is *prima facie* evidence only in respect of matters as to which said "judgment or decree would be an estoppel as between the parties thereto." This means that only those matters which were "distinctly put in issue and directly determined" in the government action are *prima facie* evidence in a subsequent private suit (*Emich Motors v. General Motors Corporation,* 340 U. S. 558, 569 (1951)). As shown in the next subparagraph, the Expediting Court expressly left open these questions for local suits and therefore did not "directly determine" such issue.

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(c) The three-judge expediting court in the New York case specifically reserved these questions for local courts (66 F. Supp. 323, 342):

> "The decision of such controversies as may arise over clearances should be left to local suits in the area concerned, or, even more appropriately, to litigation before an arbitration board composed of men versed in the complexities of this industry."

(d) The 1946 decree in the New York case (66 F. Supp. 323, 70 F. Supp. 53) was appealed to this Court which remanded the case for further trial.[8] Before such retrial, respondent Paramount entered into a consent decree in March 1949 [Tr. 312] and an order was made in the New York case terminating and severing the proceeding as to respondent Paramount. Thereafter, the case proceeded to trial as against the defendants who had not entered into consent decrees and findings of fact, conclusions of law and a decree were entered against them in 1950. At that time the judgment became final as against the defendants who had not been severed out of the case. The final decree as to Paramount was the 1949 consent decree which contains no findings on the subject contended for by petitioners. The Paramount consent decree did not adjudicate that the defendants therein had "violated" the antitrust law, as expressly required by Section 5 of the Clayton Act in order to render the prior judgment admissible as *prima facie* evidence.

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[8]That this 1946 decree, even after appeal and remand from this Court, was not admissible in a private treble damage suit, see *Fifth and Walnut v. Loew's, Inc.* (2d Cir. 1949), 176 F. 2d 587, 594; *Duluth Theatre Corporation v. Paramount Pictures* (D. C. Minn. 1947), 72 F. Supp. 625.

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2. Petitioners, though making a great to-do over the New York decree and Section 5 of the Clayton Act actually failed to offer any of the several decrees in the New York case into evidence before the Trial Court in this case.

(a) Petitioners are wrong in asserting they were prevented by ruling of the Trial Court from having the decrees in the New York case received into evidence as they argue in their brief (p. 17).

(b) The Trial Court stated that petitioner's counsel could offer the New York decrees into evidence when his time came [Tr. 131], that is, when petitioners put on their defense case in chief during the trial of the First, Second and Fifth Causes of Action. But counsel for petioners never offered the New York decree. (See *supra*, p. 30.)

(c) The Trial Court stated that he would read the Opinion in the New York case and the Opinion of the Supreme Court appealed therefrom, since he was bound thereby whether it was received into evidence or not. [Tr. 130.]

3. Finding 20 and the adjudication of the Trial Court is not, as contended by petitioners (Pet. Br. 31) a finding that the alleged conspiracy, which was the subject of the New York decree in *United States v. Paramount*, did not exist. Finding 20 and the adjudication of the Trial Court herein is simply a determination that the particular lease and franchise between petitioner Partmar and Respondent Paramount are not a part of or the result of this or any other conspiracy. Therefore, there is no nullification of or any inconsistency between the Trial Court's finding and determination on the one hand and the New York decree on the other hand.

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CONCLUSION.

It is respectfully urged that the issue of the lease and franchise being part of a conspiracy was placed in issue in the trial below. Petitioners urged the lack of any conspiracy connected with the lease and franchise. The Court accepted their contention and found that the lease and franchise were valid and subsisting and were no part of any conspiracy. Part III of the Judgment declaring the lease and franchise to be valid and subsisting agreements in all respects was based in essential part upon such finding and determination so urged upon the Trial Court by petitioners. Petitioners did not appeal from Part III of the Judgment which was very favorable to them. Instead, they have accepted the benefits of having first-run exhibition of all Paramount pictures licensed under the franchise during the balance of the term of that agreement, enjoying that benefit over all other exhibitors in the Los Angeles area, and also enjoying the clearance over all theatres in the Los Angeles area on these Paramount pictures, as well as the other benefits from the franchise and the lease. Having done all this, the law simply precludes and estops petitioners from asserting in any subsequent trial over the validity of the lease and franchise that they were a part of any conspiracy. That being so, dismissal of the Counterclaims was perfectly proper. The Judgment of the Trial Court was correct, the affirmance by the Court of Appeals was likewise correct and requires an affirmance by this Court.

Respectfully submitted,

RODNEY K. POTTER,
JACKSON W. CHANCE,
Attorneys for Respondents.

O'MELVENY & MYERS,
Of Counsel.

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FEB 23 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 17

PARTMAR CORPORATION AND FANCHON & MARCO, INC.,
Petitioners,

v.

PARAMOUNT PICTURES THEATRES CORPORATION, ET AL.,
Respondents.

PETITION FOR REHEARING.

RUSSELL HARDY,
Attorney for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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No. 17

PARTMAR CORPORATION AND FANCHON & MARCO, INC.,
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v.

PARAMOUNT PICTURES THEATRES CORPORATION, ET AL.,
Respondents.

PETITION FOR REHEARING.

Partmar Corporation and Fanchon & Marco, Inc., respectfully petition the Court for a rehearing upon the opinion and judgment entered February 8, 1954, affirming a judgment dismissing their counterclaims, and for reasons therefor state:

1. The complaint in the eviction suit in which the counterclaims were dismissed alleged that in 1938 the United States had filed suit against Paramount and others for violations of sections 1 and 2 of the Sherman Act (i.e., for unlawful conspiracy and monopolization), that a trial was had, and on December 31, 1946, the District Court had entered a judgment against the defendants. The complaint stated that the government suit was the same case decided by the District Court on June 11, 1946, and later by this Court on May 3, 1948. (*United States* v. *Paramount*, 66 F. Supp. 323; 334 U.S. 131.) The allegation was admitted

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in the Answer. (R. 12-13, 28) The fact of conspiracy and monopolization, therefore, became a conclusively established fact in this case against respondent in favor of petitioner, as to the whole length and breadth of the conspiracy and monopolization found and described in the opinions of the District Court and this Court.

2. By all rules of estoppel, *res judicata* and judgment, the fact of conspiracy thereupon became completely, irrevocably and permanently established against respondents and in favor of petitioners in the eviction suit and for the counterclaims. The issue of conspiracy being thus automatically settled, there was no necessity for proof or disproof on the subject. Consideration and decision by the court became unnecessary and inappropriate as to the existence or non-existence of conspiracy. So also it became legally impossible for the court to make a finding or judgment against conspiracy in favor of respondents.

3. If it be thought, however, that this estoppel as to conspiracy was thereafter prevented, cancelled or avoided, that result could have been accomplished, if at all, only by amendment of the complaint, before, during or at the close of the trial to conform to the evidence or otherwise. But no such amendment was at any time sought or made.

4. If it be thought that the estoppel could have been avoided by construing conspiracy out of the complaint, the answer is that this did not occur, but if it had occurred it would then have become legally impossible to derive from the eviction suit an estoppel against conspiracy applicable to the counterclaims.

5. The truth is that the trial court has not in fact made a finding or judgment against that conspiracy and monopolization. It has merely found that *on the evidence in the eviction case* it had not been proved that the franchise contract for furnishing pictures for the theatre, was *connected with* that conspiracy and monopolization. Nowhere in the

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findings, conclusions of law, opinion or judgment of the trial court is there any statement to the effect that the conspiracy alleged in the Complaint, admitted in the Answer, and again alleged in the Counterclaims, did not exist. If it was true that the franchise was not connected with the conspiracy, that is not in the slightest degree inconsistent with the existence of the conspiracy. In the government Paramount case this Court in affirming the existence of that conspiracy, although failing to find any connection between it and franchises, applied that distinction. This Court thus clearly held that the conspiracy and franchise were not inseparable. The statements of the trial court are carefully framed to avoid negativing the conspiracy. The statement in the finding that "Paramount, not in conjunction with any other major studio, entered into the franchise", is typical. (R. 103) This is clearly not a finding that Paramount and the other major studios were not engaged in the conspiracy found in the government case and alleged in the Counterclaims.

6. The counterclaims contain no allegation to the effect that they are based on and limited to the franchise, or upon its legality or illegality, standing alone or as part of the conspiracy and monopolization. The District Court has not construed the counterclaims to that effect.

7. The statement in the opinion of this Court that in the counterclaims "The conspiracy was alleged to have resulted in the imposition of excessive terms and conditions on Partmar *by the lease and franchise agreement*", is not correct. The allegation does not attribute the excessive terms and conditions to the lease and franchise but to the conspiracy. In that charge no reference is made to the franchise and lease. It states merely that "The plaintiff, and the third-party defendants have been able to impose, and they have in fact imposed, upon Partmar Corporation, excessive terms, conditions and charges for the photoplays made and released by them and exhibited at the Paramount

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Theatre, from March 2, 1933, to the present time." (R. 38-39)

8. The counterclaims begin with an allegation of the conspiracy on which they are based, i.e., that the counterclaim defendants have "engaged in a conspiracy in restraint of trade and commerce among the States, in the distribution and exhibition of motion pictures, in violation of the Act of July 2, 1890, that is to say, the same conspiracy stated in the complaint in that case", the same case of *United States* v. *Paramount* alleged in the eviction suit complaint. This allegation made clear that petitioners were relying on the conspiracy in the government case in its whole length and breadth.

9. Under that allegation petitioner was entitled to recover for any injury resulting from any of the means used in the course of or to effectuate that conspiracy.

10. The references to the lease and franchise were descriptive statements simply for the purpose of showing how the power derived from the conspiracy had been used to impose excessive picture and theatre rentals on petitioners. They were appropriate but not necessary and controlling statements. As the primary purpose and ultimate result of this conspiracy was to enable the conspirators to get more money than would otherwise have been possible, the particular terms and conditions of the contracts were immaterial to the right of the petitioners to recover the excessive money charges that had been made. All that was necessary to support their claim was (1) the fact of the conspiracy, and (2) the payment of the film and theatre rentals affected by that conspiracy. Reference to the franchise will show that it was merely an agreement to make contracts in the future for ten years and named prices for pictures for the first year only. (R. 252, 256-262)

11. The statement in the opinion that "Partmar vigorously contended in brief and in argument that the *lease*

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of the theatre and the franchise for 'first-run' exhibitions *did not in any way* violate the Sherman Act", is not correct. We understand this refers to petitioners' brief and argument in the trial court, printed at Record 45-70. In the eviction suit and counterclaim there was no issue as to the legality of the lease. The allegation in the counterclaims that the theatre rental was excessive because of the conspiracy and monopolization did not amount to an attack on the intrinsic legality of the lease.

12. Petitioners' brief in the trial court does not mention the *lease*. That brief dealt solely with the legality of the franchise on the basis, and solely on the basis, of the evidence presented by respondents at the trial. Respondents and the trial court had carefully framed the issue as confined to the legality of the franchise standing alone. This limitation was consistently applied by the Court, and is put beyond any doubt by the ruling excluding the judgment in the government case as evidence of anything but the fact that franchises had been enjoined, which meant refusing to receive it as any evidence of the conspiracy and refusing to give it an estoppel effect in that regard against respondent.

13. Petitioners were, therefore, required to confine their brief and argument to the narrow limits of the evidence. Their brief begins by stating the narrow issue to be discussed, using the words of respondents, as "the *inherent* validity or invalidity" of franchise. (R. 46) The brief then deals seriatim with the following propositions: "No interstate commerce has been alleged *or proved.*" (R. 48) "There was no allegation *or proof* of conspiracy." (R. 52) "*There is no evidence in this case* of the facts found in the government case as to admission prices". (R. 57) (Had the trial court not limited the judgment in the government case as stated, there would have been conclusive evidence in the case against respondents of unlawful admission price fixing.) "*A single contract between one film company and*

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one exhibitor, is not violative of the Sherman Act." (R. 58) *"On the evidence in this case* the Partmar franchise is neither one of a system" etc. (R. 65)

14. These propositions not only did not amount to an argument that the franchise "did not in any way" violate the Sherman Act, but they were carefully, intentionally and necessarily limited to the one specific "way" to which the evidence was limited.

15. The statement in the opinion that "Paramount did not limit its contention of illegality of the agreement to nonconspiratorial aspects of the antitrust laws, but argued that if the agreements were illegal in any way it had the right to possession", is not correct, if it means that the evidence at the trial afforded the necesssary basis for such an unlimited contention. As there was no evidence of the conspiratorial aspects, the contention, if made, was meaningless. The important and controlling ruling of the trial court excluding the judgment in the government case as evidence of conspiracy, effectively eliminated conspiracy as an issue. The Brief for Respondents in this Court states that "petitioners never offered any evidence of a conspiracy". (p. 26) Nowhere in that brief is any statement made to the effect that respondents offered any evidence of conspiracy. It must follow that it was impossible to determine *on the evidence* in this case that the franchise was *not connected* with conspiracy.

16. To prove such a connection it would be necessary to prove two facts in addition to the franchise: (1) that a conspiracy existed, and (2) there was a connection between the conspiracy and the franchise.

17. The statement in the opinion that the lease and franchise were "renumerative", is not correct, if it means renumerative to Partmar. The statement is, "It thus insisted that the remunerative lease and franchise agreements were still valid and subsisting, and that Paramount

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had no right to possession." The adjective "remunerative" indicates to petitioners that it is believed they have not in reality suffered the damages alleged in the counterclaims. Statements in respondents' brief to the effect that by defeating eviction, Partmar retained "benefits", including an exclusive first run of the Paramount pictures, which are probably the basis in part of the statement in the opinion, are contradicted by the record. (Respondents' Brief, pp. 15, 34, 79) The franchise, having been terminated prior to and as a basis for the eviction suit, was not continued or resumed at any time. After termination it was legally and factually as dead as a doornail. The District Court found that the "franchise agreement did not provide for an exclusive first run" for Partmar. (R. 103)

18. That the lease was highly remunerative to respondents, however, appears from the fact that it provided for a rental of 15 per cent of the gross receipts plus 50 per cent of the net receipts of Partnmar. (R. 225-227) As the subject of "benefits" and the supposed "remunerative" character of the contracts, has been adverted to, although outside the issues and record, petitioners respectfully beg leave also to refer to information which would have been shown on a trial of the counterclaims, to contrast the actual net profits of Partmar and of Paramount for the period of 1942-1947, as follows:

Partmar	2.46 per cent
Paramount	13.62 per cent

19. We respectfully and most earnestly urge that this case should be decided on the elementary principle that the courts in the federal system will not entertain the suit of one who bases his claim immediately and solely on his own violation of federal law, and that courts are without jurisdiction to proceed any further in such a case than shall be necessary to discover the character of the suit. This was such a suit. It was not brought to recover property belonging to respondent, but to deprive petitioners of their

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property in a lawful leasehold estate for which they had paid and were continuing to pay the full money consideration long previously agreed to by respondents.

20. The opinion of this Court states that respondents did not limit their contention of illegality, "but argued that if the agreements were illegal *in any way*", they were entitled to evict Partmar. The fact that eviction was not granted does not cure the vice of entertaining a plea based on unlawful action. From that most immoral and wrongful procedure the trial court has derived, and this Court has made finally effectual, an estoppel against petitioners' counterclaims which is far more beneficial and valuable to respondents than the eviction of Partmar.

21. The actual—certainly the unintended—repudiation of this salutary and necessary principle, has received only the slightest notice in the opinion of this Court, in the fragmentary statement that respondent "was in the anomalous position of attempting to prove that its agreements with Partmar violated the antitrust laws." If, however, we are wrong in the belief that the Court has overlooked the highly important general public significance of its decision in this regard, we respectfully submit that this aspect of the case should be fully stated and made unmistakably clear.

RUSSELL HARDY
Attorney for Petitioners.

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I hereby certify that this petition for rehearing is presented in good faith and not for delay.

RUSSELL HARDY

February 23, 1954.

Certificate of Service.

I certify that a copy of this Petition For Rehearing has been served on O'Melveny & Myers, attorneys for respondents, by mailing a copy to them by first class mail, postpaid, at 433 South Spring Street, Los Angeles 13, California, on February 23, 1954.

RUSSELL HARDY
Attorney for Petitioners

February 23, 1954.

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IN THE

Supreme Court of the United States

October Term, 1953.
No. 17.

PARTMAR CORPORATION and FANCHON & MARCO, INC.,
Petitioners,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION, *et al.*,
Respondents.

RESPONSE TO PETITION FOR REHEARING.

The Petition of Partmar Corporation and Fanchon & Marco, Inc., for a Rehearing upon the opinion and judgment entered February 8, 1954, should be denied.

The Petition states no new or different facts. It cites no new authority. It is but a rehash of the arguments which this Honorable Court rejected in its opinion after these arguments were fully presented in the Petition and Brief for Petitioners and answered in the Brief of Respondents, and after oral argument was heard on each of these contentions.

Respondents will not burden this Honorable Court with a detailed reply to each of the 21 purported reasons assigned by Petitioners. Respondents do, however, desire to point out with respect to the principal contentions that

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they are not new and to direct attention to the manner in which they have already been fully presented to and correctly determined by this Honorable Court.

Before doing so, we wish to restate the indisputable facts in this case reduced to their simplest form.

Paramount owned a theatre in downtown Los Angeles which it desired to lease to a suitable tenant. Petitioners desired to lease it and needed an assurance of Paramount product to operate it successfully. Paramount had a mutual interest with Petitioners in that it would have a satisfactory theatre in which its pictures would be shown first run in Los Angeles as the "showcase" for its pictures there. Out of these mutual desires and reciprocal benefits, the terms of the franchise and the lease were negotiated at arm's length.

At the trial, Paramount sought to cancel the lease and franchise in view of the decision in *United States v. Paramount* and to obtain possession of the theatre. Petitioners defended on the ground that the franchise and lease were valid and could not be terminated. Petitioners successfully urged that the franchise and lease were not a part of any conspiracy and were valid. The court so found. Petitioners retained possession of the theatre and obtained the full benefits of the lease and franchise for the balance of the term thereof.

Petitioners now seek to retain the fruits of their bargain and at the same time seek treble damages, claiming that they were forced by the conspiracy found in *United States v. Paramount* to pay exorbitant license fees and excessive terms for the pictures licensed under the franchise. At the trial, in defense of Respondents' cause of action for possession and declaratory judgment, Petitioners

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claimed the opposite, namely, that the franchise and lease were *not* entered into as a part of any conspiracy.

Respondents say, therefore, that on these facts the decision of this Court in affirming the judgment below is sound and should not be disturbed.

1. Effect of Decree in United States v. Paramount.

Petitioners assert (Pet. Reh. 2) that the decree in *United States v. Paramount* was entitled to conclusive effect and rendered unnecessary proof regarding conspiracy.* This same contention was made (Pet. Br. 25-31), was answered (Resp. Br. 76) and properly disposed of in the opinion [Op. 13] where it is pointed out that *prima facie* evidence of *a* conspiracy would be "no evidence that the Paramount lease was part of that conspiracy." This is, of course, equally true with respect to the franchise.

2. Legality of the Lease and Franchise Was at Issue in Trial of Possessory and Declaratory Relief Causes of Action.

Petitioners claim (Pet. Reh. 2) that the legality of the lease and franchise agreement was not an issue raised by the pleadings in the trial of the first, second and fifth causes of action. This assertion was also made (Pet. 9; Pet. Br. 24), and answered (Resp. Br. 45-47). The

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*In no event could the decree in *United States v. Paramount* have the conclusive effect of establishing a conspiracy in this case. Section 5, Clayton Act; *Emich Motors Corp. v. General Motors Corp.*, 340 U. S. 558, 568-569; *Theatre Enterprises v. Paramount*, 346 U. S. 537.

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opinion aptly points out in disposing of this question [Op. 4]:

> "The complaint sought, so far as material here, restitution of possession based on illegality of the franchise under the Sherman Act *as construed in the decree* in the Southern District of New York, *supra,* and a declaratory judgment that the lease had been properly terminated."

Petitioners' further assertion that the issue of conspiracy could only have been injected into the trial by amendment to the complaint and that no amendment was at any time sought or made (Pet. Reh. p. 2, par. 3) is not well taken. This is simply another way of stating the same argument that the issue of conspiracy was not raised by the pleadings. Since that contention was fully discussed and correctly answered by the opinion of this Court, as shown *supra,* that is an end to the matter.

3. Finding That Lease and Franchise Were Not Part of Conspiracy Is Conclusive of Counterclaims.

Petitioners contend that the finding of no connection between the franchise and any conspiracy is not conclusive of the counterclaims because the counterclaims "do not attribute the excessive terms and conditions to the lease and franchise but to the conspiracy" (Pet. Br. 3) and "petitioner was entitled to recovery for any injury resulting from any of the means used in the course of or to effectuate that conspiracy" (Pet. Reh. 4). This is not new. The same argument was made before (Pet. Br. 16). Respondents answered it (Resp. Br. 20-22). The opinion correctly notes that the gravamen of the counterclaims was that "the conspiracy was alleged to have resulted in the

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imposition of excessive terms on Partmar by the lease and franchise agreement." The only injury alleged was the imposition of "excessive terms, conditions and charges for the photoplays." No such terms, conditions or charges existed with respect to such photoplays except those provided in the lease and franchise agreement and in amendments thereto (Resp. Br. 22).*

4. Petitioners Successfully Contended in Trial Court That Lease and Franchise Agreement Was Lawful.

Petitioners did not, as they now claim (Pet. Reh. 5) confine their argument to the narrow proposition that the lease and franchise agreement was inherently valid. This

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*Petitioners assert that the franchise was merely an agreement to make contracts in the future for 10 years and named prices for pictures for the first year only (Pet. Reh. 4, par. 10). This same argument was made by petitioners in their earlier brief (Pet. Br. 3). This contention advances petitioners nowhere. The franchise agreement provided that the parties shall endeavor to agree for each successive year after the first year as to the terms and conditions upon which photoplays licensed under the franchise agreement shall be exhibited [Tr. 266-267] and provided that in the event of a failure to agree annually upon such new terms, the terms and conditions contained in the franchise for the first year should govern [Tr. 267]. The subsequent changes with regard to rental terms and conditions were effected by riders to the franchise agreement, each of which were termed "amendment and supplement" to the franchise. (These are all in the record below.) The finding of the trial court expressly covered all such amendments to the franchise agrement by expressly finding that "neither said franchise agreement, nor said lease, *nor any amendment to either of them,* constituted any part of, nor were they or any of them entered into as a result of any . . . conspiracy" [Tr. 104]. The trial court's conclusions specifically covered all such amendments by concluding that ". . . said lease and said franchise agreement and *all amendments to each of them* were in all respects lawful and were not entered into nor performed as a result of any combination or conspiracy . . ." [Tr. 107].

Hence there is nothing either new or sound in this suggestion of petitioners.

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same claim (Pet. 11; Pet. Br. 8) was answered (Resp. Br. 25-27) where full quotations from Petitioners' trial brief are set forth together with expressions of the trial court which provoked them. Those expressions made it clear to Petitioners that the court would hold the lease and franchise illegal and evict them if not satisfied it was a thing apart from any conspiracy. Thus Petitioners' assertion in their trial brief that "on the evidence in this case the *Partmar franchise* is neither one of a system, or made by one holding a dominant position, or *pursuant to a conspiracy*" [Tr. 65] was clearly a request that the court find as a fact (which it did [Tr. 103-104]) that the lease and franchise agreement was no part of any conspiracy. The opinion of this Honorable Court thus correctly states that "Partmar vigorously contended in brief and in argument that the lease of the theatre and the franchise for 'first-run' exhibitions did not in any way violate the Sherman Act" [Op. 6].

5. Trial Court Correctly Entertained and Adjudicated the Issue of Conspiracy Connected With Lease and Franchise Agreement.

The Petitioners were not restrained from showing, as they claim (Pet. Reh. 6) and as they claimed (Pet. 9-10; Pet. Br. 9), that the lease and franchise agreement was a part of a conspiracy by any ruling concerning the admissibility of the decree in *United States v. Paramount*. They were in fact *invited* by the trial court to offer the decree for this purpose [Tr. 31; Resp. Br. 30]. Having declined this invitation and having further urged that this

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agreement was not in fact part of any such conspiracy, it does not lie in Petitioners' mouths to assert (Pet. Reh. 6) that it was impossible for the court to adjudicate this issue.*

6. Remunerative Character of Lease and Franchise Not an Issue.

The attempt of Petitioners to support their Petition by groundless and improper assertions *dehors* the record (Pet. Reh. 7) that the lease and franchise "were not highly remunerative" to them is beside the point. If the agreements as executed were not desirable to them they were not forced to enter into them nor to insist that they

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*Both parties are concluded by a finding and judgment in a prior suit, or in a prior phase of the same litigation, whether or not the party having the burden of proof of a particular issue upon which a finding is made offers any evidence in support thereof. Restatement of Judgments, Sec. 68, p. 303, states:

> "On the other hand, if a question of fact is put in issue by the pleadings, and at the trial the party who has the burden of proof offers no evidence in support of his allegations, and the court directs a verdict against him, the question is litigated and a judgment on the verdict is conclusive between the parties as to the question."

This rule of law further answers petitioners' argument that "it was impossible to determine on the evidence in this case that the franchise was not connected with conspiracy" (Pet. Reh. 6). Whether or not petitioners or respondents offered or failed to offer evidence of the claimed conspiracy in the eviction phase of the litigation is wholly beside the point, as a matter of law, since the issue was before the trial court, petitioner argued that no such conspiracy was connected with the franchise, and the court made a finding directly on that issue. Under the law, the finding is binding on both parties, regardless of who had the burden of proof on that issue and regardless of what evidence was introduced on the subject. Moreover, as the parties benefited by this finding in the eviction phase of the litigation, petitioners are precluded by the rule of judicial estoppel from attempting to take the diametrically opposite position in any subsequent phase of the litigation and seek to prove that there was a conspiracy connected with the franchise.

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be validated. The fact they did so insist is hereinbefore shown, and demonstrates the fallacy of their position.

Petitioners also make the unfounded and incorrect assertion that the franchise was terminated prior to and as a basis for the eviction suit and "was not continued or resumed at any time" (Pet. Reh. 7). That is totally inaccurate. The trial court expressly concluded that "Paramount had no right to cancel or terminate the franchise agreement" [R. 107], and adjudged that the lease and franchise were valid and subsisting agreements "in full force and effect" [R. 110].

7. No Enforcement of Rights Arising Out of an Illegal Contract Was Involved.

Petitioners again charge (Pet. Reh. 7) that the trial court improperly entertained Respondents' suit to recover possession of the theatre on the ground of illegality of the lease and franchise agreement. This charge was fully presented (Pet. 22-23; Pet. Br. 21-23) and answered (Resp. Br. 50-54). The reason compelling Paramount to test the legality of the lease and franchise agreement in order to comply with the law are set forth (Resp. Br. 17). The opinion [Op. 6] clearly points out that under California law a lessor may repossess property withheld pursuant to an unlawful lease citing *Glos v. McBride,* 47 Cal. 688, 191 Pac. 67, so holding. No repudiation of the principle that courts will refuse to enforce rights arising out of illegal agreements is involved.

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Conclusion.

The Opinion of this Court shows that all Petitioners' arguments were given careful consideration and rejected. No good reason is suggested by Petitioners why further consideration should produce a different result. The Petition should be denied.

Respectfully submitted,

RODNEY K. POTTER,

JACKSON W. CHANCE,

Attorneys for Respondents.

O'MELVENY & MYERS,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

No. 17.—October Term, 1953.

Partmar Corporation and Fanchon and Marco, Inc., Petitioners, *v.* Paramount Pictures Theatres Corporation, et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[February 8, 1954.]

Mr. Justice Reed delivered the opinion of the Court.

This case presents a matter of federal practice involving inconsistent positions by litigants in court proceedings. We have often held that under the doctrine of *res judicata* a judgment entered in a cause of action conclusively settles that cause of action as to all matters that were or might have been litigated or adjudged therein.[1] But a prior judgment between parties has been held to operate as an estoppel in a suit on a cause of action different from that forming the basis for the original suit "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."[2] This latter aspect of *res judicata* is the doctrine of collateral estoppel by judgment, established as a procedure for carrying out the public policy of avoiding repetitious litigation.

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[1] *Cromwell* v. *County of Sac*, 94 U. S. 351, 352; *Fayerweather* v. *Ritch*, 195 U. S. 276, 300, 308; *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 290; *Stoll* v. *Gottlieb*, 305 U. S. 165.

[2] *Cromwell* v. *County of Sac*, *supra*, at 353; *United States* v. *Moser*, 266 U. S. 236, 241; *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 74; *Commissioner* v. *Sunnen*, 333 U. S. 591, 597–601. Cf. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 706, where the rule is recognized but its application denied because the issues differed.

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Petitioners entered counterclaims in a suit against them by respondent. These counterclaims were dismissed by the trial court upon determination of the original suit for petitioners and against respondents. The cause of action stated in petitioners' counterclaims is based upon a controverted personal right that had not been adjudged and therefore *res judicata* is no bar to the claimed right of recovery. Respondent, however, in its original suit had raised an issue, determinative of its cause of action, which had been therein successfully controverted by petitioners to final judgment on the merits. Collateral estoppel stands as a bar to further examination by the parties of this issue, and this issue was held by the trial court to be determinative of petitioners' counterclaims. Petitioners' argument that the dismissal denied a hearing of issues that might have been but were not determined by the judgment on the merits of the original action moved us to grant certiorari, limited to the issue of the counterclaims. 345 U. S. 963.

Although federal jurisdiction was sought only on the ground of diversity, the complaint relied upon a breach of the Sherman Act, and the counterclaims were similarly bottomed on that federal law. Therefore our conclusion is reached on a consideration of federal law and procedure. It will depend upon whether or not any issue of fact or law remained for decision after the primary action was decided.[3] The issue reaches us under the following circumstances.

Paramount Pictures Theatres Corp., a subsidiary of Paramount Productions, Inc., and successor to Paramount Pictures, Inc., is a New York corporation engaged in the business of operating motion picture theatres throughout the United States. These three corporations will hereinafter be referred to jointly as "Paramount."

[3] See Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1; note, Collateral Estoppel by Judgment, 52 Col. L. Rev. 647.

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On August 31, 1939, Paramount leased the Paramount Downtown Theatre in Los Angeles, California, for ten years to Partmar Corp., a California corporation, petitioner here, wholly owned by Fanchon & Marco, Inc. This lease was subsequently amended in 1942 and extended to March 18, 1952. A "film franchise agreement" was executed in conjunction with, and for the same period as, the lease. It licensed Partmar to exhibit Paramount pictures at the theatre as first "runs" of the films, required Partmar to exhibit such pictures not less than forty-six weeks each year, and set a scale of license fees. The lease expressly provided that it was terminable at the option of Paramount if the franchise agreement "be cancelled or terminated for any reason whatsoever." Other provisions of the lease and agreement are not germane to the issue before this Court.

On December 31, 1946, a decree was entered in the District Court for the Southern District of New York in an equity action brought by the United States against Paramount and other major companies of the motion picture industry alleging a conspiracy to violate the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1–2. *United States* v. *Paramount Pictures, Inc.*, 70 F. Supp. 53. One provision of that decree defined a "franchise" to be a licensing agreement "in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement" and enjoined each of the defendants in that action "from further performing any existing franchise to which it is a party and from making any franchises in the future." *Id.*, at 73, Decree, § II, 5.

On March 26, 1947, Paramount notified Partmar that it was cancelling and terminating the franchise agreement because of the injunction, and on April 2, 1947, notified Partmar that it was terminating the lease by reason of the termination of the franchise agreement. Partmar

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refused to vacate the theatre upon demand, and Paramount instituted this action on May 1, 1947, in the District Court for the Southern District of California, alleging diversity and unlawful detainer of the theatre. The complaint sought, so far as is material here, restitution of possession based on illegality of the franchise under the Sherman Act as construed in the decree in the Southern District of New York, *supra*, and a declaratory judgment that the lease had been properly terminated.

Partmar and Fanchon & Marco, Inc., answered setting up various defenses and filed three counterclaims seeking treble damages under 38 Stat. 731, 15 U. S. C. § 15, from a conspiracy between Paramount and other motion picture companies in violation of the Sherman Act. The conspiracy was alleged to have resulted in the imposition of excessive terms and conditions on Partmar by the lease and franchise agreement.[4]

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[4] Petitioner's first counterclaim alleged:

"Paramount Pictures Theatres Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation, . . . and the defendants in *United States of America* v. *Paramount Pictures, Inc., et al.*, Equity No. 87–273, in the United States District Court for the Southern District of New York, and other persons to the defendants unknown, were, at the time of the acts and transactions stated in the complaint herein, and they now are, engaged in a conspiracy in restraint of trade and commerce among the States, in the distribution and exhibition of motion pictures, in violation of the Act of July 2, 1890, that is to say, the same conspiracy stated in the complaint in that case.

. . . . . .

"32. This action has been brought by the plaintiff in pursuance of the aforesaid conspiracy, arrangements and agreements, and to evade and defeat the purpose to end the aforesaid conspiracy and restraint of trade for which *United States of America* v. *Paramount Pictures, Inc., et al.*, Equity No. 87–273, was instituted.

"33. As part of the aforesaid conspiracy, the plaintiff and the third-party defendants arranged and agreed among themselves, to require

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By order dated April 26, 1948, the District Court, upon Paramount's motion, ordered Paramount's causes of action for unlawful detainer and declaratory judgment tried separately from Partmar's counterclaims. Prior to trial on May 3, 1948, we handed down our decision on Paramount's and the other defendants' appeals from the decree of the Southern District of New York. *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131. We held *inter alia* that "we cannot say on this record that franchises are illegal *per se* when extended to any theatre or circuit, no matter how small" and set aside the District Court's findings relative to such franchises. *Id.*, at 156. Relying on that decision Partmar and Fanchon & Marco, Inc., moved in the Southern District of California for dismissal of Paramount's action against them. Their motion was denied and the case went to trial without amendment of the pleadings in November 1950, on two issues: whether Paramount was justified in terminating the franchise agreement because of the decree in the New York *Para-*

Partmar Corporation to license for exhibition at the Paramount Theatre for 46 weeks of each year, only photoplays made and released by Paramount Pictures, Inc., and, for any failure upon the part of Partmar Corporation to obey that requirement, to evict it from Paramount Theatre. The plaintiff, and the third-party defendants have been able to impose, and they have in fact imposed, upon Partmar Corporation, excessive terms, conditions and charges for the photoplays made and released by them and exhibited at the Paramount Theatre, from March 2, 1933, to the present time."

In the second counterclaim, the third party plaintiffs (petitioners) reiterated their allegations of conspiracy and based their claim for damages on an addition to the lease that required Partmar "to pay an additional sum; that is to say, fifty per cent of the net receipts of Partmar Corporation at the Paramount Theatre."

The other counterclaim is not in the record but the briefs indicate that it contained substantially the same allegation as numbers one and two.

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mount case, *supra;* whether the lease and contract were illegal contracts under the federal antitrust statutes justifying repossession of the theatre by Paramount under California law. See, *e. g.*, *Glos* v. *McBride,* 47 Cal. App. 688, 191 P. 67. Thus issue was joined as to the legality of the actions of Paramount and its alleged co-conspirators relative to the lease and franchise agreement, wholly apart from the New York injunction, and Paramount was in the anomalous position of attempting to prove that its agreements with Partmar violated the antitrust laws. Paramount did not limit its contention of illegality of the agreement to nonconspiratorial aspects of the antitrust laws, but argued that if the agreements were illegal in any way it had the right to possession. That Partmar recognized this position is clearly shown by its statement in its brief to the trial court that "after the reversal of that judgment [in the New York case], the plaintiff [Paramount] took the position that the question presented was whether the franchise was violative of the Sherman Act, wholly apart from any judgment or the decisions of the District or Supreme Courts." Partmar vigorously contended in brief and in argument that the lease of the theatre and the franchise for "first-run" exhibitions did not in any way violate the Sherman Act. It clearly recognized that one way the franchise might be illegal would be if it were the result of a conspiracy for it argued in its brief that:

> "There was no allegation or proof of conspiracy. There being no showing of interstate commerce, it is immaterial whether there was conspiracy, unreasonable clearance, fixed admission prices, block booking, or unreasonable restraint. In the absence of interstate commerce, all else was entirely beyond the purview of the Sherman Act. But, assuming that there had been no failure to prove interstate com-

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> merce, the absence of conspiracy is equally fatal. Probably the only evidence relative to conspiracy was the statement of Y. Frank Freeman, a witness for Paramount, that there were no conspiratorial arrangements between Paramount and Fox West Coast. . . . Even in a setting of conspiracy, it is doubtful that the franchise would be unlawful. . . . On the evidence in this case the Partmar franchise is neither one of a system, or made by one holding a dominant position, or pursuant to a conspiracy . . . ."

It thus insisted that the remunerative lease and franchise agreements were still valid and subsisting, and that Paramount had no right to possession.

After eighteen days of trial the District Judge on May 2, 1951, filed a memorandum opinion, 97 F. Supp. 552, in which he concluded the termination "for any reason" clause in the lease meant for any "legal or substantial reason," and that the 1946 decree of the Southern District of New York "was not a legal cause or reason for terminating the franchise agreement." He continued, "there is no evidence to indicate that any third party conspired with either Paramount or Partmar to bring into existence the franchise agreement," that "a single contract between one film company and one exhibitor is not violative of the Sherman Act," and that, since the franchise agreement was "not in itself an illegal agreement," Paramount "had no right to cancel or terminate it because of illegality." The court went on to hold that "as we find no substantial evidence of a conspiracy in this case on the part of Partmar or Paramount, we are of the opinion that the counter claimant cannot recover" on the counts seeking treble damages on the basis of an alleged conspiracy. The opinion directed Partmar to submit proposed findings of fact, both parties submitted such findings and proposed conclusions, and a hearing, upon notice, was held on June 18,

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1951. Paramount thereupon submitted Finding No. 20 and conclusion No. 11, *infra*, thus formalizing its contention that the judgment denying plaintiff's petition estopped defendant from recovering on its counterclaims for violation of the Sherman Act. At this hearing Partmar appeared and expressly objected to the adoption of the proposed finding and conclusion which required the dismissal of their treble damage counterclaims. Argument was heard on Partmar's objection, but the court adhered to its position and adopted among its findings No. 20 which provides:

> "Paramount, not in conjunction with any other major studio, entered into the franchise agreement which gave to Partmar the right to exhibit the first-run feature pictures of Paramount in the City of Los Angeles. Neither said franchise agreement, nor said lease, nor any amendment to either of them constituted any part of, nor were they or any of them entered into as a result of any agreement, combination or conspiracy of any kind whatsoever between Paramount and any other person or persons, nor between Partmar and any other person or persons."

And conclusion No. 11 which provides:

> "Inasmuch as the said lease and said franchise agreement and all amendments to each of them were in all respects lawful and were not entered into nor performed as a result of any combination or conspiracy of any kind whatsoever on the part of either plaintiffs, defendants, third party plaintiff or third party defendants, with any person or persons; inasmuch as said lease, said agreement and amendments thereto have neither the purpose or effect of restraining or monopolizing trade or commerce among the several states in the production, distribution, trans-

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portation, sale or exhibition of motion pictures; and inasmuch as each was an agreement solely between plaintiff and defendants, or defendants and third party plaintiffs and third party defendants dealing solely with the Paramount Theatre Los Angeles alone and the exhibition thereat; third party plaintiffs, and each of them, cannot recover upon the first, second and fourth counterclaim, or any of them." [5]

The court simultaneously entered an order giving judgment for Partmar on Paramount's two counts of unlawful detainer, declaring the rights and duties of the parties under the franchise and the lease, and dismissing with prejudice Partmar's three treble damage counterclaims.

Partmar, apparently not wishing to jeopardize its valuable lease and franchise, took no appeal from parts of the District Court's judgment declaring the lease and franchise to be valid and subsisting and the theatre not to be unlawfully detained.[6] Therefore those parts of the

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[5] Partmar had brought in other parties as third party defendants under Fed. Rules Civ. Proc. 14. Their presence is not important in this phase of the controversy.

[6] While Partmar did not appeal, it might have. The finding and conclusion of law just quoted were essential to the determination of Paramount's claim for possession of the theatre. Paramount's position after this Court's reversal of the franchise portion of the New York decree, was that the agreements were invalid under the federal antitrust statutes as the product of an illegal conspiracy. It is only when a finding of law or fact is not necessary for a decree that the prevailing party may not appeal and the finding does not form the basis for equitable estoppel. This is shown by the case cited to support the statement as to appeal in *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 176. See *New York Telephone Co.* v. *Maltbie*, 291 U. S. 645, and cases cited. *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241, stated the practice negatively. "A party may not appeal . . . findings not necessary to support the decree." Professor Scott, *supra*, note 3, at 12, concurs in this view. Restatement, Judgments, § 68 reads: "(1) Where a question of fact

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judgment must be accepted as valid and binding on the parties. Partmar did, however, serve timely notice of appeal to the Court of Appeals for the Ninth Circuit from so much of the District Court judgment as dismissed with prejudice the treble damage counterclaims. The Court of Appeals for the Ninth Circuit, in a *per curiam* opinion on December 16, 1952, 200 F. 2d 561, noted agreement with the opinion of the District Court and affirmed the District Court judgment. As heretofore indicated, our consideration is "limited to the issue of the counterclaims."

Partmar contends that the District Court erred in dismissing its counterclaims with prejudice without a separate trial as to their merits, which the trial court had previously ordered, and that such dismissal deprived it of due process of law. In particular, it argues that it was denied the valuable property right of having admitted in evidence during a trial the judgment in the case of *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, which, it argues, would provide, under § 5 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 16, prima facie evidence of the conspiracy on which the counterclaims were based. We think these contentions are without merit. The

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essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action, except as stated in §§ 69, 71 and 72." Section 69 (2) ["Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action."] is immaterial because the conspiracy determination was essential for Partmar's defense to Paramount's claim. See *Galloway* v. *General Motors Acceptance Corp.*, 106 F. 2d 466. The paucity of cases in this field is explainable by the infrequent happening of a need of a prevailing party to set aside a determination necessary to a judgment in his favor.

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power remained in the trial court until the entry of his final judgment to set aside, for appropriate reasons, the former order for separate trial of the counterclaims.

Each of Partmar's counterclaims for treble damages was predicated upon allegations that Paramount and their alleged co-conspirators engaged in a conspiracy in restraint of trade and commerce, and that the allegedly "excessive terms, conditions and charges for the photoplays made and released by them" and the exaction of fifty percent of the net receipts, imposed by the lease and franchise agreement, were part of such conspiracy. The District Court found in the principal action, which decision was not appealed and is not before us, that neither the lease nor the franchise were the results "of any agreement, combination or conspiracy of any kind whatsoever." Of course, if this finding were not material to the principal action the doctrine of collateral estoppel would not apply. But this finding was obviously necessary to the court's judgment that the agreements were not illegal. Partmar had ample opportunity upon trial to present evidence and to contest the conspiracy finding, and argument was heard prior to adoption of the findings. This finding, binding all of the parties, determined the key ingredient of Partmar's counterclaims contrary to its allegations and thus precluded recovery upon such claims. A separate trial on the counterclaims would have been improper procedure as the judgment entered on the complaint was a final disposition of the determinative issue on the counterclaims—whether or not the terms of the lease were a product of an illegal conspiracy.[7]

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[7] *Southern Pacific R. Co.* v. *United States*, 168 U. S. 1, 48–49:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be

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The allegations of the counterclaim charge that as a result of "the same conspiracy stated in the complaint" in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, Partmar was damaged in the terms of its lease from Paramount. Yet this very lease was sustained by the judgment in this case on the ground that it was not violative of the Sherman Act. Partmar moved to dismiss the complaint in this case after this Court's decision in the *Paramount Pictures* case on the ground that it "had become moot by the demonstrated non-existence of the basic fact," *i. e.*, the illegality of the lease. In its brief in the trial court, petitioner stated its position clearly.

> "The effect of the opinion seems to be that franchises are not unlawful per se, that is, apart from conspiracy, and that on the record in that case they were not shown to have been parts of the conspiracy.
>
> . . . . .
>
> "The Supreme Court seems at least to have clearly indicated that a franchise with one exhibitor for one theatre, like that with Partmar, was not involved in the case. It said in effect that only franchises with defendants and franchises for theatres in a circuit were involved."

Nor would unlimited admission in evidence of the final decree in *United States* v. *Paramount Pictures, Inc., supra*, have aided Partmar. We had reversed the only finding in that case pertaining to the illegality under the Sherman Act of franchise agreements between exhibitors and producers, and the final consent decree as to Paramount en-

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disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

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tered on March 4, 1949, contains no findings on such subject. Cf. *United States* v. *Paramount,* 85 F. Supp. 881, 897. Since final judgments or decrees in Government antitrust actions are admissible under § 5 of the Clayton Act as prima facie evidence only of issues actually determined in the prior adjudication,[8] the Government judgments provide no proof of the indispensable element to Partmar's counterclaims, that the lease and franchise were part of or the result of a conspiracy. From the decree there would have been prima facie evidence of a conspiracy but no evidence that the Partmar lease was a result of that conspiracy so as to overturn the trial court's finding in this very proceeding that no illegality tainted the lease. Partmar, therefore, was not prejudiced by the fact that the District Court did not consider either the judgment or the decree as evidence of the conspiracy alleged in the counterclaims. As we have pointed out, the conclusion of the trial court went beyond the lawfulness of the "franchise," as distinguished from the lease of which it was a part and held that the lease was not secured by conspiracy. See p. 7, *supra.* This was

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[8] *Emich Motors Corp.* v. *General Motors Corp.,* 340 U. S. 558, 568–569:

"We think that Congress intended to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit.

"The evidentiary use which may be made under § 5 of the prior conviction of respondents is thus to be determined by reference to the general doctrine of estoppel. . . . Accordingly, we think plaintiffs are entitled to introduce the prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based."

See *Theatre Enterprises* v. *Paramount,* 346 U. S. 537; *Monticello Tobacco Co., Inc.* v. *American Tobacco Co.,* 197 F. 2d 629.

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res judicata of that fact, if it be considered a fact and nonetheless *res judicata* if it is a decision on the law, binding in another cause of action arising from the same controversy or claim.[9]

Affirmed.

MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this case.

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[9] *United States* v. *Moser*, 266 U. S. 236, 242:

"The contention of the Government seems to be that the doctrine of *res judicata* does not apply to questions of law; and, in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law."

Emich Motors Corp. v. *General Motors Corp.*, 340 U. S. 558, 569; Cf. *United States* v. *Stone & Downer Co.*, 274 U. S. 225, 230.

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SUPREME COURT OF THE UNITED STATES

No. 17.—October Term, 1953.

Partmar Corporation and Fanchon and Marco, Inc., Petitioners, *v.* Paramount Pictures Theatres Corporation, et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[February 8, 1954.]

Mr. Chief Justice Warren, whom Mr. Justice Black joins, dissenting.

I cannot join in the Court's decision. Relying on the doctrine of collateral estoppel, it affirms the trial judge's dismissal of petitioner's treble damage counterclaims without a trial. The doctrine, I believe, is inapplicable to the facts of this case.

The Court correctly states the well-settled rule that a prior judgment on a different cause of action is not conclusive as to questions which might have been but were not actually litigated in the original action.[1] The inquiry, therefore, must be whether the conspiracy issue was actually litigated in the eviction suit; if it was not so litigated, the District Court's finding as to the absence of evidence of conspiracy cannot preclude petitioner on its counterclaims. The Court rests its decision on the assumptions (1) that the conspiracy issue was litigated in the eviction suit and (2) that in any event petitioner had a full opportunity to litigate the issue. Neither assumption, it

[1] *Cromwell* v. *County of Sac*, 94 U. S. 351, 353. See also Restatement, Judgments, § 68; Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 2–3, 5–6; Comment, Collateral Estoppel, 52 Col. L. Rev. 647, 652–657; Developments in the Law, Res Judicata, 65 Harv. L. Rev. 818, 840–841; Von Moschzisker, Res Judicata, 38 Yale L. J. 299, 311–312; Cleary, Res Judicata Reexamined, 57 Yale L. J. 339, 342–343; Freeman, Judgments (5th ed.), §§ 674–676.

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seems to me, is warranted by the facts. To those facts I now turn.

The respondent, Paramount, sought to take advantage of its own violation of the federal antitrust laws by bringing an eviction suit to cancel a valuable lease held by its tenant, the petitioner, on a Los Angeles theatre. The lease provided that it was terminable if, "for any reason whatsoever," petitioner's franchise for the showing of Paramount's pictures should be "cancelled or terminated." Paramount, in its complaint charging unlawful detainer, did not allege in any respect that the franchise was invalid because part of a conspiracy; rather, the crux of the complaint was that the franchise had been terminated by the District Court decree in the Government antitrust action against Paramount and others. *United States* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323, 70 F. Supp. 53. After the eviction complaint had been filed, the decree in the Government action was reviewed here; the Court sustained the decree as to the existence of a nationwide conspiracy among the defendants, but reversed that portion of the decree which held that franchises were illegal *per se*. 334 U. S. 131, 155–156. Petitioner moved to dismiss, contending that the basis of the eviction complaint had been swept away by this Court's decision. In opposing the motion to dismiss, Paramount made an about-face and urged the illegality of the franchise on other grounds: its minimum price requirements, block booking, and restrictions on runs and clearances. Paramount alleged that these provisions of the franchise agreement, apart from any conspiracy and independent of the decree in the Government action, rendered the agreement an illegal "contract . . . in restraint of trade" under the Sherman Act. This new theory of the case was accepted by the trial court without any change in the pleadings, and the motion was denied.

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In its answer, petitioner set up as a defense that Paramount was seeking to evict petitioner in pursuance of the conspiracy enjoined in *United States* v. *Paramount Pictures, Inc., supra,* and that the effect of an eviction would be to drive petitioner out of business and thus enable Paramount to extend an unlawful monopoly over motion picture theatres. On Paramount's motion, the defense was stricken as an improper collateral attack on the right of the lessor to recover possession of the theatre.

The answer also contained petitioner's counterclaims, alleging that Paramount and others named as cross-defendants had engaged in the conspiracy enjoined in *United States* v. *Paramount Pictures, Inc., supra,* and that by reason of this market control Paramount had been able to exact from petitioner monopoly profits in the form of overcharges for theatre and film rentals. Treble damages and injunctive relief were sought. On Paramount's motion to dismiss the counterclaims, they were sustained as valid actions under the antitrust laws.[2]

Both actions—the eviction suit and the counterclaims—were then ready for trial. Paramount moved that the two actions be tried separately. Petitioner consented and the court so ordered, the eviction suit to be tried first.

Throughout the lengthy trial of the eviction suit, the trial judge repeatedly complained of the total absence of any evidence showing that the franchise was part of a conspiracy. His complaint went unheeded. Paramount, which had the burden of proof in the eviction suit, not only failed to introduce such evidence but never even alleged such a conspiracy. Petitioner, on the other hand, never denied the existence of the conspiracy, but argued that the franchise in itself was not invalid.[3] And both

[2] 38 Stat. 731, 15 U. S. C. § 15.

[3] The Court's opinion, apparently for the purpose of showing that the conspiracy issue was actually litigated, points to statements in

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times that petitioner sought to inject the conspiracy issue into the case, it was prevented from doing so. As I have already noted, petitioner's answer alleged that the eviction suit was brought in pursuance of the conspiracy; on Paramount's motion, the defense was stricken. Later when Paramount offered into evidence the decree in the Government action for the limited purpose of showing Paramount as being subject to the injunctive features of the decree, petitioner objected on the ground that the decree "should go in as a document in toto—no part of it but the whole thing." In support of the objection, petitioner argued that § 5 of the Clayton Act [4] made the decree prima facie evidence of the conspiracy established in the Government action. Again petitioner was overruled.

At the conclusion of the eviction trial, the court gave judgment for petitioner because of Paramount's failure to show the illegality of the franchise by evidence of conspiracy. As to the counterclaims, the court stated: [5]

> "At the time of trial, it was agreed that action on the counterclaims should be postponed until after the trial of the main issue involved and no evidence was offered by either plaintiff or defendant on the counterclaims."

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petitioner's trial brief to the effect that Paramount had failed to establish a conspiracy in restraint of interstate commerce. It is difficult to understand how petitioner's argument at the trial that the conspiracy issue was *not* litigated can now be converted into proof that the issue *was* litigated. Petitioner's statements in its brief amounted to nothing more than a wholly justifiable contention that Paramount had failed in its burden of proof in the eviction suit; the statements merely pointed out that the franchise was valid in the absence of evidence of conspiracy and that Paramount had not even alleged a conspiracy—by pleadings, evidence, or oral argument.

[4] 38 Stat. 731, 15 U. S. C. § 16.

[5] 97 F. Supp. 552, 561.

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Nevertheless, the court dismissed the counterclaims without trial on the ground that there was ". . . no substantial evidence of a conspiracy in this case on the part of Partmar or Paramount. . . ."[6] The court thus disposed of both the eviction suit and the counterclaims on the same ground—the absence of any evidence of conspiracy.

I submit that on these facts the Court's two assumptions are unwarranted. The issue of conspiracy was not litigated; nor did petitioner have a fair opportunity to litigate the issue. Indeed, whether petitioner had an opportunity to do so is immaterial under the doctrine of collateral estoppel. If the counterclaims had been based on the same cause of action as the eviction suit, such an opportunity might have barred petitioner under the more sweeping doctrine of *res judicata*. But here, where the second suit is based on a different cause of action, a neglected opportunity in the first action to litigate an issue is without legal significance.[7]

Under these circumstances, should the doctrine of collateral estoppel be invoked against petitioner to bar a trial on its counterclaims? I believe not. The doctrine presupposes, and the Constitution requires, that the party who is estopped had his day in court in a prior action and that he then had a fair hearing in which to prove his point but failed. Surely the doctrine was never intended to estop a party who in the prior action was denied such a hearing.

That, as I see it, is precisely the situation here. The eviction suit and counterclaims had been severed for trial purposes. During the trial of the eviction suit, Paramount was the only party with any reason or justification for proving that the franchise was part of a conspiracy. Because of Paramount's failure to present such proof, the

[6] *Ibid.*

[7] See note 1, *supra*.

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court held the lease to be valid, but at the same time gave judgment against petitioner on his counterclaims because of the same shortcoming of Paramount's proof. This Court now affirms. The anomalous result is to penalize petitioner for refusing to help Paramount win the eviction suit.

I believe that petitioner has been denied his day in court, and that the case should be reversed with instructions to the trial court to hear the counterclaims.[8]

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[8] There is yet an additional reason for not applying the doctrine of collateral estoppel here. Petitioner, as the successful party in the eviction suit, could not appeal the District Court's finding that there was no evidence of conspiracy. *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 176; *New York Telephone Co.* v. *Maltbie*, 291 U. S. 645. The adverse finding was not included in the Court's decree, as in *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241. Because of this inability to appeal, the finding cannot bind petitioner in a subsequent action between the parties based upon a different cause of action. See Restatement, Judgments, § 69 (2); Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 15–18.

The Court's opinion (footnote 6) concedes that inability to appeal precludes a subsequent application of collateral estoppel, but contends that petitioner could have appealed here because the trial court's finding in the eviction suit (as to the absence of proof of conspiracy) was material to the decree in the eviction suit. The Court's opinion cites no case, in this Court or any other, holding that a successful party can appeal findings which are not inserted as part of the decree. Indeed, the opinion overlooks the very holdings of this Court on which it relies for support. In both *Lindheimer* v. *Illinois Bell Telephone Co.*, *supra*, and *New York Telephone Co.* v. *Maltbie*, *supra*, the findings which the public utility sought to appeal related to the value of its property for rate-making purposes; in each case, the trial court had held that the rates fixed by a state commission were confiscatory *on the basis of those findings*. Yet this Court held that the public utility, as the successful party, could not appeal those findings. Surely in this case the trial judge's finding as to conspiracy was no more "material" to the decree in the eviction suit than the findings which this Court refused to review in *Lindheimer* and *Maltbie*.

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